TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1921

No. [redacted]202

GREAT NORTHERN RAILWAY COMPANY AND JOHN BARTON PAYNE, DIRECTOR GENERAL OF RAILROADS, PETITIONERS.

vs.

MERCHANTS ELEVATOR COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

PETITION FOR CERTIORARI FILED JANUARY 17, 1922.
CERTIORARI AND RETURN FILED MARCH 24, 1922.

(26043)

No. 686.

GREAT NORTHERN RAILWAY COMPANY AND JOHN BARTON PAYNE, DIRECTOR GENERAL OF RAILROADS, PETITIONERS,

vs.

MERCHANTS ELEVATOR COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

INDEX.

8 21910.

State of Minnesota, in Supreme Court, 1920.

MERCHANTS ELEVATOR COMPANY, Respondent,
vs.
GREAT NORTHERN RAILWAY COMPANY, AND United States Railroad Administration, Walker D. Hines, Director General of Railroads, appellants.

RECORD.

M. L. Countryman and F. G. Dorety, St. Paul, Minnesota.
Dille, Hoke, Krause & Faegre, 300 Security Building, Minneapolis, Minneasota, attorneys for appellants.
Harold G. Simpson, 630 First Nat'l-Soo Line Building, Minneapolis, Minnesota, attorney for respondent.

1 State of Minnesota, in Supreme Court, 1920.

State of Minnesota, Municipal Court, county of Hennepin, city of Minneapolis.

MERCHANTS ELEVATOR COMPANY, PLAINTIFF,
vs.
GREAT NORTHERN RAILWAY COMPANY, AND United States Railroad Administration, Walker D. Hines, Director General of Railroads, defendants.

COMPLAINT.

Now comes the plaintiff in the above-entitled action and alleges and shows to the court as follows:

I.

That plaintiff is a corporation duly organized and existing under the laws of the State of Minnesota, with its principal office at Minneapolis, Minnesota.

II.

That the Great Northern Railway Company was at all times herein mentioned and still is a duly organized corporation. That defendants own and operate lines of railroad within the State
2 of Minnesota as well as many other States, and that said defendants were, at all times herein mentioned, and still are, common carriers of goods for hire.

III.

That heretofore there were certain cars of corn shipped from certain points billed to Willmar, Minnesota, as more fully set forth in Exhibit "A" hereto attached and hereby made a part of this complaint. That all of said cars were billed to Willmar, Minnesota, in order that the grain therein could be sampled and graded, in accordance with the laws of the State of Minnesota and in accordance with the practice of the defendants herein. When said cars had been sampled and graded, the plaintiff herein ordered them delivered to Anoka, Minnesota, upon which orders the defendants herein acted, and said cars were so delivered to Anoka, Minnesota.

IV.

Plaintiff further alleges that said defendants illegally, contrary to their duly published tariffs, contrary to the rules of the Railroad and Warehouse Commission of the State of Minnesota and the Interstate Commerce Commission and contrary to law, arbitrarily collected from plaintiff five dollars ($5.00) on each of said cars in excess of the lawful freight charges. That said charge of five dollars ($5.00) so collected by defendants and paid by plaintiff was illegal, arbitrary, and unlawful. That the plaintiff was obliged to and did pay
3 to the defendants on each of said carloads of grain such excessive and unlawful charge without, however, in any instance consenting to the payment of said charges, and without in any way waiving or agreeing to waive their claims against the defendants for a refund of such charges so unlawfully exacted.

V.

That hereto attached is a schedule marked Exhibit "A," showing in detail the facts concerning each of said cars. Said schedule and the facts therein stated, are incorporated herein, and made a part hereof. That the date of shipment is shown in said schedule in the column under the caption "Date of shipment." The car number and initial are shown in the column under the caption "Car No. and initial." That the point of origin is shown in the column under the caption "Point of origin." That the date of payment is shown in the column under the caption "Date of payment." That the amount collected is shown in the column under the caption "Amount collected."

VI.

That all of the said cars were billed to and shipped to the plaintiff herein. That the plaintiff was the owner of said grain, and that plaintiff paid the freight on said shipment and all other lawful charges.

VII.

That by reason of the foregoing facts the defendant became indebted to the plaintiff in the sum of eighty dollars ($80.00). That the plaintiff has duly demanded from the defendants payment
4 and refund of said sum, but that notwithstanding such indebtedness and demand, the defendants have refused and wholly failed to pay said sum or any part thereof.

Wherefore, the plaintiff prays judgment against the defendants for the sum of $80.00, together with interest thereon, at the rate of six per cent (6%) per annum, from the date of payment of said charges, together with a reasonable attorney's fee, together with plaintiff's costs and disbursements herein.

HAROLD G. SIMPSON,
Attorney for Plaintiff,
1012 Security Building,
Minneapolis, Minnesota.

EXHIBIT "A."

Date of ship't.	Car No. & initial.	Point of origin.	Date of pay't.	Am't col-lected.
8/ 2/18	M. H. 79564	Council Bluffs, Iowa	8/24/18	$5.00
8/20/18	D. R. G. 66027	" " "	8/27/18	"
8/ 8/18	M. H. 85554	" " "	8/28/18	"
8/12/18	N. Y. C. 208119	Omaha, Neb	8/28/18	"
8/ 8/18	Pa. 40371	Council Bluffs, Iowa	8/26/18	"
8/13/18	I. C. 172472	Omaha, Neb	8/29/18	"
8/13/18	I. C. 21133	Council Bluffs, Iowa	8/29/18	"
8/ 7/18	G. T. 25357	" " "	8/24/18	"
8/ 6/18	Mo. P. 21724	" " "	8/24/18	"
7/27/18	Big 4—6195	" " "	8/13/18	"
8/ 7/18	B. M. 1300	" " "	8/24/18	"
8/ 7/18	P. & E. 45929	" " "	8/24/18	"
8/ 6/18	C. G. W. 22222	" " "	8/24/18	"
7/30/18	A. C. L. 43725	" " "	8/16/18	"
7/31/18	C. R. G. & P. 44344	" " "	8/20/18	"
7/30/18	G. T. 102706	" " "	8/19/18	"

5 (Title of cause.)

SEPARATE ANSWER OF DEFENDANT GREAT NORTHERN RAILWAY COMPANY.

Comes now the defendant, Great Northern Railway Company, and for its separate answer to the complaint of the plaintiff herein:

1. Denies each and every allegation, matter, and thing in said complaint contained except such as may be hereinafter expressly admitted.

Wherefore, this defendant prays that plaintiff take nothing and that this defendant may be hence dismissed with its costs and disbursements herein.

COBB, WHEELWRIGHT & DILLE,
Attorneys for Defendant, Great Northern Railway Company,
311 Nicollet Avenue, Minneapolis, Minnesota.

(Title of cause.)

SEPARATE ANSWER OF WALKER D. HINES, DIRECTOR GENERAL OF RAILROADS.

Comes now the defendant, Walker D. Hines, Director General of Railroads, operating the Great Northern Railway, and for his separate answer to the complaint of the plaintiff herein:

1. Denies each and every allegation, matter, and thing in said complaint contained except such as may be hereinafter expressly admitted.

2. Admits the allegation contained in paragraph 1 of said
6 complaint and admits that at the times mentioned in said complaint the said Great Northern Railway was being operated by the Director General of Railroads of the United States of America.

Wherefore, this defendant prays that plaintiff take nothing and that this defendant may be hence dismissed with his costs and disbursements herein.

COBB, WHEELWRIGHT & DILLE,
Attorneys for Walker D. Hines, Director General of Railroads,
311 Nicollet Avenue, Minneapolis, Minnesota.

(Title of cause.)

SETTLED CASE.

The above entitled case came on for trial before Hon. Mathias Baldwin, without a jury, on the 24th day of October, 1919.

Mr. Harold G. Simpson appeared on behalf of the plaintiff, and Messrs. John Benson and John F. Finerty appeared on behalf of the defendants.

The following proceedings were had and the following testimony introduced:

Mr. SIMPSON. May it please the court, this is a so-called overcharge case, involving the construction of a tariff. I realize that it is a difficult one for any court or any lawyer, outside of an expert traffic man, to handle or to understand it. For that reason I think I had better make a statement to the court as to what is involved as nearly as I can, state the facts.

7 This action involves sixteen cars. These cars originated down at Sioux City, Iowa, Council Bluffs and Omaha, the so-called corn district. I believe they are all cars of corn. They were billed to Willmar, Minnesota, which the court will remember is an official sampling point in the State of Minnesota, on the Great Northern Railroad, and they were billed to that point for the purpose of official inspection. There were reasons for that. We will show that the plaintiff in this case sold quantities of corn to be shipped to several different points, some to Anoka—I think these cars went to Anoka—some to St. Cloud and some to Minneapolis. They would

sell, say, 300,000 bushels of No. 3 corn to be shipped to Anoka, the same to be based on Minnesota grades, and they were billed to Willmar for the purpose of determining what the grade was; because if it was No. 4 it went to St. Cloud, if it was No. 3 it went to Anoka, and if No. 5 or No. 6 it went to Minneapolis. When these cars reached Willmar the State made its official inspection and notified the plaintiff what the grade was. The plaintiff then ordered these particular cars to Anoka, Minnesota. They made that order, as we will show, by surrendering their original billing and getting new billing. The Great Northern, as shown on their freight bills, on each one of these cars charge $5 for this so-called reconsignment and the plaintiff in this case claims that that was an illegal charge.

It should be understood that we are not attacking the rate
8 as unreasonable or discriminatory or prejudicial, or anything of that kind, because if we were I admit we would first have to go before the Interstate Commerce Commission. Our position is simply this: That by the terms of the tariff which was in force at that time, there was no authorized or legal charge, such as this, and the Great Northern made this charge without proper authority, and therefore we are entitled to the refund.

The tariff involved is: "G. N. Ry. G. F. O., No. 1240–A" and Supplement No. 1 thereto. I will not argue as to our reasons now. But that tariff, effective May 1, 1918, was, by order of the Interstate Commerce Commission (or a certain part of it) suspended, and by Supplement No. 1 of the same date, May 1, 1918, the Great Northern Railway issued a supplement of one page canceling certain portions of that tariff.

These cars, I might say, moved in August, 1918, while the suspension was still in force. It is our contention that the reconsigning of those cars was suspended, that is, the five-dollar rule was suspended. It is the contention of the Great Northern that the charge of five dollars was still in effect. And the only question, as far as I know, in this case is simply what the tariff provides, and we will try to explain that by experts who are a great deal more familiar with tariffs than I am, so that the court can see our position, and I presume the Great Northern can do the same.

The COURT. Was this one single shipment?

Mr. SIMPSON. No, there are sixteen, I think. There is a schedule there.

9 The COURT. Just one cause of action, however, isn't it?

Mr. SIMPSON. Yes.

Mr. FINERTY. The same question, exactly, is involved in all of them?

Mr. SIMPSON. Yes; the cars were handled exactly in the same way, and there is just one cause of action involved.

Mr. BENSON. They all originated at Iowa points?

Mr. SIMPSON. Yes; they are interstate shipments.

The COURT. The point I am getting at is, they are really separate causes of action for each car; isn't that it?

Mr. BENSON. We don't object to that.

Mr. SIMPSON. I will call Mr. Barwin as a witness.

J. E. BARWIN, being duly sworn as a witness on behalf of the plaintiff, testified as follows:

Examined by Mr. SIMPSON:

Q. Your name is what?

Mr. FINERTY. Before the testimony is offered, may it please the court, I wish to move the court to dismiss this action on counsel's statement, on the ground that counsel's statement, as well as the complaint filed herein, shows that the question involved is a question of the construction of an interstate tariff filed with the Interstate Commerce Commission, and that that question is one within the exclusive jurisdiction of the Interstate Commerce Commission
10 under the decisions of the United States Supreme Court, in the case of Texas & Pacific Railway Company v. American Tie & Timber Company, Ltd., 234 U. S., 138, and Loomis v. Lehigh Valley Railroad Company, 240 U. S., 43.

In those cases the United States Supreme Court held that, of necessity, a question of tariff construction must, in the first instance, be within the exclusive jurisdiction of the Interstate Commerce Commission, because, otherwise, the effects of the act to regulate commerce, which is intended to obtain uniformity in the application of rates, would be impossible.

If each court were to construe a given tariff according to the idea of the particular court as to what it meant, it would mean that in this court the tariff would be construed one way and a court in Iowa it would be construed in another, or in the courts of the same State it might be construed in several different ways. The result would be that the uniformity of rates required by the interstate commerce act would be impossible, as each court, in applying its own construction of the rate, would automatically change the rate on every shipment brought before the court.

To avoid that situation, the United States Supreme Court holds, in the cases to which I have referred, that the matter must first be referred to the Interstate Commerce Commission for its construction of the tariff. When that construction is made, at the suit of any shipper, all shippers generally throughout the United States using that tariff or shipping under that rate may take advan-
11 tage of that construction and may sue in any court of competent jurisdiction in the United States, but until that construction is made, the matter is not one of which a court can take original jurisdiction. The construction placed by the Interstate Commerce Commission on the tariff, under the decision of the Supreme Court of the United States, becomes an award, upon which any shipper throughout the United States can sue. The result is that the Interstate Commerce Commission, being the body charged by the interstate commerce act with the policing of interstate tariffs,

with regulating the manner in which they shall be filed, and their contents, is in a position to make a uniform construction, uniformly applicable throughout the United States, so that all shippers will pay exactly the same rates, and thus avoid the situation which would arise if any court were permitted to construe the tariff—that one shipper in one place would pay a certain rate and on an opposite construction of the tariff another shipper in another place would pay a different rate. The great object of the interstate commerce act was to prevent that very thing and to obtain uniformity of rates as to all shippers.

I, therefore, ask the court to dismiss this case at this time, because, the complaint fails to show any award by the Interstate Commerce Commission and because, as Mr. Simpson stated, the question involved is necessarily the construction of an interstate tariff.

12 Mr. SIMPSON. I thought this question had been pretty well settled, but Mr. Finerty does not seem to agree with me. I have merely brought in here two cases. I cite the cases which Mr. Finerty relies on for the opposite proposition. I also have a case, involving exactly the same point, in the Minnesota Supreme Court, which is exactly to the opposite of Mr. Finerty's contention. The first one is National Elevator Company v. Chicago, Milwaukee & St. Paul Railway Company, 246 Fed., 588. The other one is Reliance Elevator Company v. Chicago, Milwaukee & St. Paul Railway Company, 139 Minn., 69. I believe all the cases are summed up, and both decisions are very clear. One of the cases in the Supreme Court I argued myself and briefed the proposition in this jurisdiction, and both practically hold that it is a question of construction. That is where the cases differ. We are not attacking the rate as unreasonable, or saying this rate ought to be put out of effect. We are simply saying that under the tariff you have published, the rate is illegal, and it is purely a question which the court has jurisdiction to determine.

Mr. FINERTY. The case of the American Tie & Timber Company, with which Mr. Simpson may or may not be familiar, and which may or may not be cited in those cases—I haven't seen the decision, and I can't say—is a case of construction and has nothing to do with the reasonableness or the discriminatory character of the rate. The sole question involved in that case and the flat decision of the Supreme Court was that in a case of tariff construction the

13 question was for the decision of the Interstate Commerce Commission in the first place, and that decision being made then suit might be brought in court. It is not a question of ousting a court of jurisdiction; it is a question of the necessary condition precedent to an action in court, which court otherwise would have no jurisdiction of the question.

The COURT. Supposing a tariff should be published as to certain freight shipments and a charge should be made which was in excess of the charges published. Would that have to go to the Interstate Commerce Commission for decision?

Mr. FINERTY. The answer I will make, may it please the court, is the logical answer, and your honor is right in presuming that my theory would go that far, and I would say yes, it would have to. But that question does not arise here.

The COURT. What I was trying to get at was the general principle which ought to govern every case, if possible.

Mr. FINERTY. Yes; and your honor is entirely correct in assuming that I would go that far, although it is not necessary in this case, because that question does not arise here. It will develop before your honor that in this case there are two tariff provisions, one of which was suspended. The question before the court is which of those tariff provisions, or, rather, under which tariff provision this charge was made. There is, we contend, a specific tariff provision under which this charge was authorized and made, and there is another tariff provision which we contend is inapplicable to
14 these shipments and which was suspended, and under which, admittedly, no charge could have been made. Therefore, it is not a case where plainly on the face of the tariff there was no authority for the charge. Now, I may say that if we came into court with a tariff that said a charge of five dollars shall be made on a given shipment, and we charged six dollars, I would not contend that the Interstate Commerce Commission had still to be consulted before the court would have jurisdiction. There would be something that would, by the terms of the tariff itself, be fixed—a charge of five dollars. No court in the land, presumably, would say that in that case a charge of six dollars ought to be made or a charge of four dollars. Therefore, the necessity of uniformity would not be in question, which is the sole condition upon which the Supreme Court holds the Interstate Commerce Commission can act. That is where the question involved necessarily goes to the uniformity of the rates, and the Interstate Commerce Commission must decide that question, because otherwise there would be varying decisions in various courts. If you have a rate on its face plainly five dollars and we should charge six dollars, and Mr. Simpson should come into court to collect the extra dollar paid, I would concede without hesitancy that this court would have jurisdiction of such a suit, without any finding by the Interstate Commerce Commission. I just want for a minute to refer you to the American Tie & Timber Company case.

15 Mr. SIMPSON. That case is considered in both of these cases.

The COURT. So far as counsel have indicated, the precise question does not seem to be a construction of the tariff, but to determine whether or not any charge should be made.

Mr. SIMPSON. It is, just as Mr. Finerty said, to determine whether it was nothing or five dollars; that is all there is to it. We say there is no charge. He says there is a five-dollar charge.

The COURT. That depends on whether the modification was in effect?

Mr. FINERTY. No; it depends on this, your Honor, if I may point out specifically what is involved here—and that is the question whether this charge is made under rule 10 of Great Northern Tariff No. 1240-A.

Mr. SIMPSON. I think you will find it on the bottom of page 3 of this tariff. They claim this applies to this shipment, and we claim, under our construction, it does not. There are other provisions here——

Mr. FINERTY. Or was it a charge made under this provision on page 4 of the same tariff, headed, "Rules and charges governing grain, seed (field), seed (grass), hay, or straw, carloads, held in cars on tracks for inspection and disposition order incident thereto billed destination or at point intermediate thereto." Mr. Simpson's contention is that this is a shipment under which the latter rule is applicable, and therefore no charge is to be made. Our contention is that rule 10 on page 3 is the applicable rule, and therefore a five-dollar charge should be made. The question involved, therefore, is whether the tariff should be construed as making rule 10 applicable or as making the exception on page 4; and it must be obvious to the court that if this court holds that the exception is applicable—if this court should hold that rule 10 is applicable and that a five-dollar charge must be made here, and some other shipper, not represented by Mr. Simpson, goes into the District Court of Iowa or the District Court of Nebraska, on exactly similar shipments, and that court should hold that the exception to the rule is applicable, that shipper would get the same shipment made for five dollars less, destroying the uniformity of the application of rates, which is the object of the interstate commerce act to provide against and which is the sole basis upon which the Supreme Court holds that the Interstate Commerce Commission must have original jurisdiction.

Our position is not because of any disinclination to submit the controversy to this court. This court is undoubtedly as competent to say which of these two rules applies as is the Interstate Commerce Commission, but that same concession must be made as to any other court before whom the question is raised, and obviously there may be some differences of opinion among forty or fifty different courts.

The COURT. And between the judges of this court.

Mr. FINERTY. Yes, exactly. It might come up before some other judge of this court and a different construction be made, and therefore you would have the extraordinary situation that an interstate tariff, supposed to provide a uniform rate applicable to all shippers alike, would in one court be applied in one way, making a shipper pay five dollars, and in another court applied in another way, under which the shipper would escape the five-dollar payment. It seems to me perfectly self-evident that the reason upon which the American Tie Company case proceeds is the reason which should appeal to this court.

I am not familiar, I confess, with the cases which Mr. Simpson cites. They are cases of subordinate courts, but I can say this, that in those cases—and I doubt if Mr. Simpson has correctly construed those cases—if those cases construed the American Tie Company case as passing off on the question of the reasonableness or the discriminatory character of a rate, they are contradicted by the very words of the court itself, which expressly comments on the fact that the question there involved is the construction of the tariff and that that question of all others should be uniformly decided.

(After further argument the court said he would receive the testimony, subject to the objection.)

Examined by Mr. SIMPSON:

Q. Your name is what?

A. J. E. Barwin.

Q. And what is your position or occupation?

A. In charge of traffic on the Merchants Elevator Company.

Q. The plaintiff in this case?

18 A. Yes, sir.

Q. And how long have you been so employed?

A. With the Merchants Elevator Company about two years.

Q. In general, what is the nature of your duties there?

A. Handling traffic matters.

Q. You have general supervision of the movement of traffic and anything that pertains to the railroads?

A. Yes, sir.

Q. And whatever is done there is done under your jurisdiction or supervision or orders?

A. Yes, sir.

Q. Anything that pertains to the service?

A. Yes, sir.

(A package of Great Northern Railway freight bills, consisting of 16 in number, was marked "Plaintiff's Exhibit A.")

Q. Showing you plaintiff's Exhibit A, composed of 16 pages of bills, I will ask you to state what they are, just in a general way.

A. They are the bills covering particular charges——

Q. Well, they are railroad expense bills?

A. Yes, railroad expense bills.

Q. And presented to the company and paid by your company to the Great Northern Railroad Company?

A. Yes, sir.

Q. And they show the point of origin, dates, consignees, point of destination, and so forth?

19 A. Yes, sir; they do.

Mr. SIMPSON. I offer plaintiff's Exhibit A in evidence.

Mr. FINERTY. These are the originals?

Mr. SIMPSON. Yes.

Mr. FINERTY. No objection.

The COURT. Received. These cover the cars described in the complaint, I suppose.

Mr. SIMPSON. Yes; they cover the cars described in the complaint.

For the purpose of showing the form of these documents, the first of the freight bills is here copied into the record and is as follows:

Great Northern Railway. Freight bill. Form 7.
1602 Anoka, Minn., Station, Aug. 16, 1918.
Freight bill No. 150.

Consignee Order Merchants Elev.
Destination Notify Pillsbury Flour Mill Co.
Route C. B. & Q. Sioux City Gn.
(Point of origin to destination.)

To Great Northern Railway Company, Dr., for charges on articles transported:

Waybilled from	Waybill date and No.		Full name of shipper	Car initials and No.
Council Bluffs.	July 31-18. 5004.		Omaha Elev. Co.	C. R. I. & P. 44344.
Point and date of shipment.	Connecting Line reference.		Previous waybill references.	Original car initials and No.
Number of packages. Articles and marks.	Weight.	Rate.	Freight.	Advances total.
Bulk corn.	86790	20	173.58	
			5.00	R/C. Willmar.
			178.58	

(In pen:) CK 15341.
(Stamp:) Great Northern Ry. Co.
Accounting Dept. Correct Freight Receipts Division (Stamp) G. N. 137788.
*Total, prepaid, $_____.
Received payment Aug. 20, 1918. Total freight, 178.58.
20 M. F. Shepherd agent War tax 5.36
Per_____Cashier Total 183.94

*For use at junction points on freight subject to connecting line settlement.

(On back of:)

Rules.

1. This form must be prepared with typewriter, or pen and ink, all information called for to be shown in full and in a clear and legible manner.

2. Weight, rate, and charges must be shown in detail for less carload shipments.

3. Demurrage, switching, icing, or other miscellaneous charges not included in the rate for transportation must be stated in detail, and the points at which such charges accrued shown.

4. When charges are assessed on track scale weights, gross tare, and net weights on which charges are based and name of weighing station must be shown.

5. The route over which the shipment moved from point of origin to destination, including the initials of each carrier and name of each connecting line junction point, must be shown.

6. Overcharges will be refunded only on presentation of original paid freight bills.

7. Original paid freight bills should accompany claims for overcharge, loss, or damage.

8. All freight will be subject to demurrage or storage charges, or both, as provided in published tariffs.

(Stamp:) Mail desk 1918, Aug. 21, a. m. 8.34.

PILLSBURY FLOUR MILLS COMPANY,
Minneapolis.

21 Q. Calling your attention to the column "Freight," there is a charge on each one of these marked $5.00, is there not?

A. Yes, sir.

Q. Besides the amount of the freight. And opposite that is written R/C. Willmar. I will ask you if you know what that means?

A. It means reconsigning charge assessed at Willmar.

Q. That is, in each case $5.00, and is in each case in addition to the freight?

A. Yes, sir.

A package of papers, consisting of 32 sheets, was marked "Plaintiff's Exhibit B."

Q. Showing you plaintiff's Exhibit B, composed of 32 pages, or sheets, I will ask you to state what they are?

A. The smaller certificate on here is the grain inspection certificate, which inspection is made by the Minnesota State grain inspection department at Willmar, Minnesota, and the larger certificate on here is a copy of the original waybill that was surrendered in lieu of the waybill issued at Council Bluffs——

Mr. FINERTY. You mean bill of lading?

WITNESS. Yes; bill of lading—at point of origin, and reconsigning the cars from Willmar to their destination.

Q. Signed in each case by your company and the railroad agent?

A. Yes, sir.

22 Mr. SIMPSON. I offer plaintiff's Exhibit B in evidence. If you have the originals I will put them in.

Mr. FINERTY. I haven't them here. May it be admitted that these shipments originally were billed to Willmar, from the points of origin to Willmar, Minnesota?

Mr. SIMPSON. I think that appears on the freight bills. Yes; it is admitted that the original billing was from the points of origin to Willmar, Minnesota. These bills I am putting in are the bills used for reconsigning from Willmar to Anoka.

Mr. FINERTY. And, as stated on the face of these bills of lading, are issued in exchange for the original bills of lading.

Mr. SIMPSON. Yes.

Mr. FINERTY. No objection.

The COURT. Received.

Mr. FINERTY. Mr. Simpson, just to make the record clear, the original bills of lading were Chicago, Burlington & Quincy Railroad bills of lading, identical in all respects with these bills of lading except that the cars were consigned to Willmar instead of from Willmar to Anoka.

WITNESS. Yes; it is so stated on these bills of lading that they were issued in exchange.

Mr. SIMPSON. It says, "Issued in exchange for bill of lading * * * by the agent of Q."

For the purpose of showing the form of plaintiff's Exhibit B, which are sheets in groups of two, the first and second sheets are here copied into the record, and are as follows:

23 PLAINTIFF'S EXHIBIT B.

N.F.191 B. State of Minnesota.
Grain Inspection Certificate. 83485.
Minnesota State Grain Inspection Department.
Minneapolis, Minnesota, 8–16–1918.

I hereby certify that I hold a license under the United States grain standards act to inspect and grade the kind of grain covered by this certificate; that on the above date I inspected and graded the following lot or parcel of grain, and that the grade thereof, according to the official standards of the United States, is that stated below:

Car No. 79564. Car initial, N. H. Location, Gt. Nor. Ry. Willmar. Amount, 1 car. Kind, corn. Grade, 3 White. Package %. ------ Analysis ------ pounds ------ per bushel and percentages ------

Pounds per bu.	Moisture content	Other classes (following columns blank). Hard Red Spring; Hard Red Winter; Soft Red Winter; Common White; White Club; Durum.
53.	11.2%.	

Damaged (other than heat 4%.

(Other columns blank.)

Remarks.

G. H. Tunell, Chief Grain Inspector of Minnesota, St. Paul, Minnesota. (Seal.)

Richard Gibbs, Chief Deputy Inspector of grain, Minneapolis, Minn.

E. G. Johnson. Licensed Inspector, Per F. W. W.

(Printed on back:)

This certificate is valid for "In" inspection, but not for "Out" inspection except when shipment is made in same car not later than close or second business day after date hereof and without removal of grain or any change in its identity.

Stamped on face: 3rd copy.

24 Stamped across face: See reverse side.

Sheet 2. New Form 82.

For use in connection with the standard form of order bill of lading approved by the Interstate Commerce Commission.

Order No. 787 of June 27, 1908.

Amended to conform to the Cummins amendment to interstate commerce law. Great Northern Railway Company

Shippers No. ------

Agents No. --------

This memorandum is an acknowledgment that a bill of lading has been issued and is not the original bill of lading, nor a copy or duplicate, covering the property herein named, and is intended solely for filing or record.

Received, subject to the classifications and tariffs in effect on the date of the receipt by the carrier of the property described in the original bill of lading, at Willmar, Minn. ------, 19----, from Merchants Elevator Co. the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time
25 interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The surrender of the original order bill of lading properly indorsed shall be required before the delivery of the property. Inspection of property covered by the bill of lading will not be permitted unless provided by law or unless permission is indorsed on the original bill of lading or given in writing by the shipper.

The rate of freight from ------ to ------ is in cents per 100 lbs. (followed by black columns).

Consigned to order of Merchants Elevator Co.

Notify Pillsbury Mills Co.

Destination: Anoka, State of Minn., County of ------

Route -------. Car initial, N. H. Car No. 79564.

No. -------. Description of articles -------. Weight -------. Packages, and special marks. (Subject to correction.)

Corn 66000

60 Cap. Car.

(Following columns blank.) "Class or rate": "Check column": "If charges are to be prepaid, write or stamp here," "To be prepaid." ------ "Received $------ to apply in prepayment of the charges on the property described hereon -------. Agent or cashier. Per ------ (The signature here acknowledged only the amount prepaid.)"

"Charges advanced: At ------ For ------ $------

26 (Stamp at top of document) United States Railway Administration, etc.

Stamped at bottom: This bill of lading is issued in exchange for bill of lading No. ------ issued at Co. Bluffs, Ia., on the 1 day of August, 1918, by the Agt. of Q. Ry.

Also stamped: This b/l issued in exchange for original on file in office of G. A. G. N. Ry., Minneapolis, Minn.

Also stamped: Received August 10, 1918, general agent, Minneapolis, Minn. P. E. Weay, agent.
Merchants Elev. Co. Shipper
Per J. E. S.
(Printed conditions on back of document.)

Q. Calling your attention to the dates on the certificate of inspection, I will ask you if you know what those dates stand for?

A. They are the dates that the inspection was made.

Q. And then calling your attention on the bills of lading to the stamp "Received," with the date in it, I will ask you if you know what that is?

A. That is the date that the agent of the Great Northern signed the new bill of lading in exchange for the original.

Q. You filed these on that day?

A. Yes, sir.

Mr. SIMPSON. I think it appears clearly they were filed on the date of inspection.

Q. I will ask you, Mr. Barwin, do you know whether or not the station of Wilmar is a station where the State of Minnesota
27 makes official inspection?

A. They do; yes, sir.

Q. That is a regular official inspection station on the Great Northern, and all grain passing through there is sampled by the State of Minnesota and by other bureaus, and so forth?

A. Yes, sir.

Q. I will ask you if this $5.00, or any part thereof, on each one of these Exhibit A, has been paid or refunded?

A. No, sir; it has not.

Q. You had general supervision, did you, of the way these cars were billed—that is, they were billed under order; they were billed to Willmar?

A. Yes, sir.

Q. Will you state why that was done?

A. In order to secure Minnesota State inspection.

Q. For what purpose?

A. For filling sales.

Q. Will you describe a little more fully what you mean by that?

A. These cars moved at a time when they were milling a good deal of corn in the north here, and we went in the Omaha market and bought corn, and we bought it on the basis of Omaha weights and Omaha inspection, and in order to sell the commodity to the millers in the Northwest here we had to sell it on the basis of Minnesota State inspection, and for that reason, before we could give final disposition of the cars we had to move the cars to a common sampling or inspection point.

28 Q. And when the grade was determined, then you ordered them to wherever that particular car would fill a particular sale?

A. Yes, sir.

A Great Northern Railway Company tariff, "G. F. O. No. 1240-A," was marked "Plaintiff's Exhibit C."

Q. Showing you plaintiff's Exhibit C, I will ask you to state what that is.

A. This is a Great Northern tariff covering the local and joint rules and charges governing diversion or reconsignment of carload freight.

Mr. BENSON. What is the number of it?

Q. Number 1240-A; is that correct?

A. Yes, sir.

Q. Great Northern number. What is the I. C. C. number?

A. I. C. C. No. A-4524.

Mr. SIMPSON. Plaintiff offers in evidence plaintiff's Exhibit C, under an agreement with counsel that the tariff need not be certified to.

The COURT. Received.

Plaintiff's Exhibit C is as follows:

Only one supplement to this tariff will be in effect at one time.

G. N. Ry. W. P. S. C. No. 658. Cancels conflicting portions of G. N. Ry. W. P. S. C. No. 566.

G. N. Ry. N. D. R. C. No. 41. Cancels conflicting portions of G. N. Ry. N. D. R. C. No. 34.

G. N. Ry. I. C. C. No. A-4524. Cancels reconsigning rules and charges shown in Part A, pages 33, 34, and 35 of G. N. Ry.
29 I. C. C. No. A-4295, as amended on pages 4, 5, and 6 of Supplement No. 1 to G. N. Ry. I. C. C. No. A-4295, except in so far as they apply on fresh or green fruits, fresh or green vegetables (including potatoes and onions), fresh berries and melons; and except in so far as they apply on coal and coke as shown on pages 5, 6, and 7 hereof.

G. N. Ry. G. F. O. No. 1240-A. Cancels reconsigning rules and charges shown in Part A, pages 33, 34, and 35 of G. N. Ry. G. F. O. No. 440-B as amended on pages 4, 5, and 6 of Supplement No. 1 thereto, except in so far as they apply on fresh or green fruits, fresh or green vegetables (including potatoes and onions), fresh berries and melons; and except in so far as they apply on coal and coke as shown on pages 5, 6, and 7 hereof.

Great Northern Railway Company,
Watertown & Sioux Falls Ry. (FX 2, No. 13),
G. F. D. No. 3416.

Local and joint tariff naming rules and charges governing diversion or reconsignment of carload freight at stations on the above named lines except on intrastate traffic in Minnesota, South Dakota, Wisconsin, Iowa, Montana, and Idaho.

Issued April 23, 1918. Effective May 1, 1918.

The rules and charges governing diversion and reconsignment contained in this schedule are filed on five days' notice under authority

of the Interstate Commerce Commission's Fifteenth Section Order No. 499 of March 26, 1918, without formal hearing, which
30 approval shall not affect any subsequent proceeding relative thereto.

Issued under authority of Order No. 3092 of the Washington Public Service Commission.

H. H. BROWN,
Assistant Traffic Mgr. Great Northern Ry. Co.,
St. Paul, Minn.

M. J. COSTELLO,
Assistant Traffic Mgr. Great Northern Ry. Co.,
Seattle, Wash.

Issued by P. H. Burnham, General Freight Agent, Great Northern Ry. Co., St. Paul, Minn.

Rules and charges governing the diversion or reconsignment of carload freight.

Application.

Freight in carloads, except as provided below, may be diverted or reconsigned on this company's lines, subject to the following rules, regulations, and charges.

If request is made for the diversion or reconsignment of freight, in carloads, this company will make diligent effort to locate the shipment and effect diversion or reconsignment, but will not be responsible for failure to effect the diversion or reconsignment desired unless such failure is due to the negligence of its employes.

Definition.

For the purpose of applying these rules, the term "Diversion" or "Reconsignment" means:

(a) A change in the name of the consignee.
31 (b) A change in the name of the consignor. (See rule 6.)
(c) A change in destination. (See rule 5.)

(d) A change in route at the request of consignor, consignee, or owner.

(e) Any other instructions given by consignor, consignee, or owner necessary to effect delivery which requires a change in billing or an additional movement of the car, or both. (See section (d) of exceptions.)

Conditions.

The services herein authorized are subject to the following conditions:

(a) That shipments have not broken bulk.

(b) Orders for diversion or reconsignment will not be accepted under these rules at or to a station or to a point of delivery against which an embargo is in force.

(c) On "straight consignments the original bill of lading should be surrendered or other proof of ownership established. On shipments consigned "to order" original bill of lading should be surrendered, or in its absence, satisfactory bond of indemnity executed in lieu thereof, or other approval security given at the time the diversion or reconsignment order is placed.

(d) Request for diversion or reconsignment must be made or confirmed in writing.

(e) Prepayment or guarantee of charges: All charges accruing under these rules must be paid or guaranteed to the satisfaction of the carrier by the person or persons requesting the diversion
32 or reconsignment or reforwarding before shipments are forwarded.

Exceptions.

These rules will not apply to—

(a) Grain, hay, straw, or grass and field seeds held or stopped for official inspection. (See page 4.)

(b) Fresh or green fruits; fresh or green vegetables (including potatoes and onions); fresh berries and melons.

(c) Coal and coke (not including petroleum coke).

For rules and charges governing the diversion or reconsignment of coal and coke, at St. Paul, Minneapolis, Minnesota Transfer, Duluth, Minn., Superior, Allouez, Wis., also all stations on the line St. Paul to Duluth, and Cloquet, Minn., inclusive, Index Nos. 1 to 36, inclusive, of G. N. Ry. G. F. O. No. 435–B, I. C. C. No. A-4413, see pages 5, 6, and 7 hereof.

For rules and charges governing the reconsignment or diversion of coal and coke at all other stations, see G. N. Ry. G. F. O. No. 440–B, I. C. C. No. A–4295, supplements thereto and reissues thereof.

No charge will be made—

(c) For a single diversion or reconsignment if order for such diversion or reconsignment is received at initial billing point before car leaves the yard at such initial billing point, provided the change involves no extra movement of the car.

33 (d) Where a car is placed for delivery at destination, and an order for the delivery of the contents thereof to other than the billed consignee is or has been presented to and accepted by the agent of this company at destination, and no change is involved in billing records, nor additional movement of car required.

(e) Where a change in route is made necessary by embargo placed against the billed destination or route thereto subsequent to acceptance of the shipment by carrier at point of origin.

Rules and charges.

Rule 1. Transfers and waybills covering shipments which have been diverted or reconsigned under these rules should bear separate notation stating where and when the diversion or reconsignment was effected and charges, if any, were made.

Rule 2. Freight rate applicable: These rules and charges will apply whether shipments are handled at local rates, joint rates, or combination of intermediate rates. The through rate to be applied under these rules is the rate from point of origin via the diversion, reconsigning, or reforwarding point to final destination in effect on date of shipment from point of origin. If the rate from original point of shipment to final destination is not applicable through the point at which the car is diverted, reconsigned, or reforwarded, in connection with this line, the tariff rates in effect to and from the diversion, reconsigning, or reforwarding point will apply, plus diversion or reconsigning charges.

34 Rule 3. Demurrage and track storage rules: Freight stopped, diverted, reconsigned, or reforwarded under these rules will in addition be subject to demurrage and track storage charges lawfully in effect at point where stopping, diversion, reconsignment, or reforwarding is accomplished.

Rule 4. (a) Application: The rules published herein, governing the diversion or reconsignment of freight, are applicable while the freight is in possession of this company, also when it has reached billed destination on this line and has been delivered to switching road for placement.

(b) Switching charges additional: If diversion or reconsignment is made after arrival of car at billed destination and the car has been delivered to a connecting road, the switching charges of connecting road will be in addition to any other charge named herein.

(c) Diversions or reconsignments beyond rails of this company: When diversion or reconsignment is requested after shipment has passed out of possession of this company, or when request is received too late for this company to effect the change desired, such request will be transmitted to direct connecting carrier to which shipment was delivered, when the responsibility of this company will end; and the shipment will be subject to rules of the carrier on whose rails the diversion or reconsignment is accomplished (except as per section (a) of this rule).

Rule 5. (a) Only one change in destination will be permitted by this company under these rules, except as provided in section
35 (b), and then only provided the car has not had a previous change in destination after leaving the initial billing point.

(b) If the consignor, consignee or owner requests a subsequent change necessitating movement of the car, the shipment will be treated as a reshipment from point of reforwarding and will be charged at the tariff rate therefrom, plus $5.00 per car.

(c) If a car is stopped short of billed destination after it has had one diversion or reconsignment under these rules, charges will be made on basis of the tariff rates to and from the point at which the first diversion or reconsignment was accomplished plus five dollars ($5) per car in addition to the other diversion or reconsignment charges previously accrued.

Rule 6. Change in name of consignor: The charge for a change in the name of consignor with no further change in billing instructions, will be $1.00 per car, except as provided in exception (c).

Rule 7. Diversion or reconsignment in transit: If a car is diverted or reconsigned in transit prior to arrival at original destination, or if the original destination is served by a terminal yard, then prior to arrival at such terminal yard, a charge of $2.00 per car will be made for such service.

Rule 8. Stopping in transit: If a car is stopped for orders for the purpose of delivery or diversion or reconsignment or reforwarding prior to the arrival at original billed destination, or if such destination is served by a terminal yard, then prior to arrival at such
36 terminal yard, on request of consignor, consignee or owner, a charge of $2.00 per car will be made for such service and the point where the car is stopped will be considered the destination of the freight. If the car is subsequently forwarded from point at which held, the provisions of rules 9, 10, 11, or 12, as the case may be, will also be applied. The service of stopping as provided in this rule will not prevent one change of destination under the provisions of section (c) of rule 5.

Rule 9. Changed at destination on orders given before arrival: If order for diversion or reconsignment is placed with local freight agent at billed destination or other designated officer, in time to permit instructions being given to yard employes prior to arrival at such billed destination, or if the original destination is served by a terminal yard, then prior to arrival at such terminal yard, a charge of $2.00 per car will be made for such service.

Rule 10. Diversion or reconsignment to points outside switching limits before placement: If a car is diverted, reconsigned or reforwarded on orders placed with local freight agent or other designated officer after arrival of car at original destination, but before placement for unloading, or if the original destination is served by a terminal yard, then after arrival at such terminal yard, a charge of $5.00 per car will be made if car is diverted, reconsigned or reforwarded to a point outside of switching limits of original destination.

37 Rule 11. Diversion or reconsignment to points within switching limits before placement: A single change in the name of consignee at destination and (or) a single change in or a single addition to the designation of his place of delivery at destination will be allowed:

(a) Without charge, if order is received in time to permit instructions to be given yard employes prior to arrival of car at desti-

nation, or if the destination is served by a terminal yard, then prior to arrival at such terminal yard.

(b) At a charge of $2.00 per car if such orders are received in time to permit instructions to be given to yard employes within twenty-four (24) hours after arrival of car at destination, or if the destination is served by a terminal yard, then within twenty-four (24) hours after arrival at such terminal yard. (See note.)

(c) At a charge of $5.00 per car if such orders are received subsequent to twenty-four (24) hours after arrival of the car at destination, or if the destination is served by a terminal yard, then subsequent to twenty-four (24) hours after arrival at such terminal yard. (See note.)

NOTE.—In computing time, Sundays and legal holidays (national, State, and municipal) will be excluded. (When a legal holiday falls on Sunday the following Monday will be excluded.)

Rule 12. Diversion or reconsignment to points outside switching limits after placement: If a car has been placed for unloading at original billed destination and reforwarded therefrom without
38 being unloaded, to a point outside of the switching limits, it will be subject to the published rates to and from the point of reconsignment, plus five dollars ($5.00) per car reconsignment charge, except that in no case shall the total charge be less than the charge based on the through rate from point of origin to final destination, plus $5.00 per car reconsignment charge.

Rule 13. Diversion or reconsignment to points within switching limits after placement: Cars that have been placed for unloading and which are subsequently reforwarded without being unloaded to a point within the switching limits of the billed destination will not be subject to diversion or reconsignment charge, but will be subject to the switching or local rate in addition to the rate from point of origin to billed destination.

Rules and charges governing grain, seed (field), seed (grass), hay or straw, carloads, held in cars on track for inspection and disposition orders incident thereto at billed destination or at point intermediate thereto.

Grain, seed (field), seed (grass), hay or straw, carloads, may be held in cars on track for the privilege of National, State, board of trade, or other official inspection and disposition orders incident thereto at billed destination or at a point intermediate thereto, subject to the following rules and charges. These charges shall be made in addition to demurrage, track storage, and other lawful charges, and shall accrue to the road performing the service and be noted on the waybill.

39 The term grain as used herein includes corn, barley, oats, rye, wheat, buckwheat, popcorn, grain screenings, and seed screenings.

Rules.	Charge (see note 1).
Rule 1. When disposition order is received prior to expiration of twenty-four (24) hours after first 7.00 a. m. after arrival.	$2.00 per car.
Rule 2. If disposition order is received subsequent to the period prescribed in rule 1, but within seventy-two (72) hours after first 7.00 a. m. after arrival.	$2.00 per car for the first 24 hours plus a charge of $1.00 per car for each additional 24 hours or fraction thereof.
Rule 3. If disposition order is not received within the seventy-two (72) hour period prescribed in rule 2.	$5.00 per car.

NOTE 1.—If delivery is taken and car is unloaded from track where inspected, above charges named in rules 1, 2, and 3 will not apply.

Rule 4. In computing time, Sundays and legal holidays (National, State, and municipal) will be excluded. When a legal holiday falls on a Sunday, the following Monday will be excluded.

Rule 5. For the purpose of disposing of car after it has been officially inspected the disposition order received after official inspection will be considered as being in lieu of consignment instructions under which car arrived at official inspection point.

Rule 6. If grain, hay, straw, field seed, or grass seed, carloads, is held on track except for official inspection, the general diversion and reconsigning rules published herein will apply.

Rules and charges governing the diversion or reconsignment of coal and coke.

The following rules and charges will apply at St. Paul, Minneapolis, Minnesota Transfer, Duluth, Minn.; Superior, Allouez, Wis.; and all stations on the line from St. Paul to Duluth and Cloquet, Minn., shown at Index Nos. 1 to 36, inclusive, of G. N. Ry. G. F. O. No. 435-B, I. C. C. No. A-4413. Rules and charges shown in G.N. Ry. G. F. O. No. 440-B, I. C. C. No. A-4295, supplements thereto and reissues thereof, will continue to apply at all other stations.

Application.

Coal, coal boulets or briquets, or coke (except petroleum coke), in carloads, may be diverted or reconsigned on this company's lines, subject to the following rules, regulations, and charges.

If request is made for diversion or reconsignment this company will make diligent effort to locate the shipment and effect diversion

reconsignment, but will not be responsible for failure to effect the ersion or reconsignment desired unless such failure is due to the ligence of its employes.

Definition.

or the purpose of applying these rules, the term "Diversion" or econsignment" means:

a) A change in the name of the consignee.

b) A change in the name of the consignor. (See rule 6.)

c) A change in destination. (See rule 5.)

d) A change in route at the request of consignor, consignee, or ner.

e) Any other instruction given by consignor, consignee, or owner essary to effect delivery which requires a change in billing or an litional movement of the car, or both. (See section (b) of excep- ns.)

Conditions.

a) Orders for reconsignment or diversion will not be accepted der these rules at or to a station or to a point of delivery against ich an embargo is in force.

b) Request for diversion or reconsignment must be made or con- ned in writing, and be accompanied by satisfactory evidence of nership.

c) Prepayment or guarantee of charges: All charges accruing der these rules must be paid or guaranteed to the satisfaction of carrier by the person or persons requesting the diversion or recon- nment or reforwarding before shipments are forwarded.

Exceptions.

No charge will be made—

(a) For a single diversion or reconsignment if order for such diversion or reconsignment is received at initial billing point before car leaves the yard at such initial billing point, ovided the change involves no extra movement of the car.

(b) Where a car is placed for delivery at destination, and an order r the delivery of the contents thereof to other than the billed con- gnee is or has been presented to and accepted by the agent of this mpany at destination, and no change is involved in billing records, r additional movement of car required.

(c) Where a change in route is made necessary by embargo placed gainst the billed destination or route thereto subsequent to accep- nce of the shipment by carrier at point of origin.

Rules and charges.

Rule 1. Transfers and waybills covering shipments which have en diverted or reconsigned under these rules should bear separate

notation stating where and when the diversion or reconsignment was effected, and charges if any were made.

Rule 2. Freight rate applicable: These rules and charges will apply whether shipments are handled at local rates, joint rates, or combination of intermediate rates. The through rate to be applied under these rules is the rate from point of origin via the diversion, reconsigning, or reforwarding point to final destination in effect on date of shipment from point of origin. If the rate from original point of shipment to final destination is not applicable through the point at which the car is diverted, reconsigned, or reforwarded, in connection with this line, the tariff rates in effect to and from the diversion, reconsigning, or reforwarding point will apply, plus diversion or reconsigning charges.

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Rule 3. Demurrage and track storage rules: Shipments stopped, diverted, reconsigned, or reforwarded under these rules will in addition be subject to demurrage and track storage charges lawfully in effect at point where stopping, diversion, reconsignment, or reforwarding is accomplished.

Rule 4. (a) Application: The rules published herein are applicable while the shipment is in possession of this company, also when it has reached billed destination on this line and has been delivered to switching road for placement.

(b) Switching charges additional: If diversion or reconsignment is made after arrival of car at billed destination and the car has been delivered to a connecting road, all switching charges of connecting road will be in addition to any other charge named herein.

(c) Diversions or reconsignments beyond rails of this company. When shipment has been delivered to connecting line before diversion or reconsignment can be accomplished, request to divert or reconsign should be made direct to such connecting line, except as provided in section (a) of this rule.

Rule 5. (a) Only one change in destination will be permitted under these rules by this company, except as provided in section (b), and then only provided the car has not had a previous change in destination after leaving the initial billing point.

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(b) If the consignor, consignee, or owner requests a subsequent change necessitating movement of the car, the shipment will be treated as a reshipment from point of reforwarding, and will be charged at the tariff rate therefrom, plus $5.00 per car.

(c) If a car is stopped short of billed destination after it has had one diversion or reconsignment under these rules, charges will be made on basis of the tariff rates to and from the points at which the first diversion or reconsignment was accomplished plus five dollars ($5) per car in addition to the other diversion or reconsignment charges previously accrued.

Rule 6. Change in name of consignor: The charge for a change in the name of consignor with no further change in billing instruc-

tions will be $1.00 per car, except as provided in section (a) of exceptions.

Rule 7. Diversion or reconsignment in transit: If a car is diverted or reconsigned in transit prior to arrival at original destination, or if the original destination is served by a terminal yard, then prior to arrival at such terminal yard a charge of $2.00 per car will be made for the service.

Rule 8. Stopping in transit: If a car is stopped for orders for the purpose of delivery or reconsignment or diversion or reforwarding prior to the arrival at original billed destination, or if such destination is served by a terminal yard, then prior to arrival at such terminal yard, on request of consignor, consignee, or owner, a charge of $2.00 per car will be made for such service, and the point where the car is stopped will be considered the destination of the freight. If the car is subsequently forwarded from point at which held, the provisions of rules 9, 10, 11, or 12, as the case may be, will also be applied. The service of stopping as provided in this rule will not prevent one change of destination under the provisions of section (c) of rule 5.

Rule 9. Changed at destination on orders given before arrival: If order for diversion or reconsignment is placed with local freight agent at billed destination, or other designated officer, in time to permit instructions being given the yard employes prior to arrival at such billed destination, or if the original destination is served by a terminal yard, then prior to arrival at such terminal yard, a charge of $2.00 per car will be made for such service.

Rule 10. Diversion or reconsignment to points outside switching limits before placement: If a car is diverted, reconsigned or reforwarded on orders placed with local freight agent, or other designated officer after arrival of car at original destination, but before placement for unloading, or if the original destination is served by a terminal yard, then after arrival at such terminal yard, a charge of $5.00 per car will be made if car is diverted, reconsigned or reforwarded to a point outside of switching limits of original destination.

Rule 11. Diversion or reconsignment to points within switching limits before placement: A single change in the name of consignee at destination and (or) a single change in or a single addition to the designation of his place of delivery at destination will be allowed:

(a) Without charge if order is received in time to permit instructions to be given yard employes prior to arrival of car at destination, or if the destination is served by a terminal yard, then prior to arrival at such terminal yard.

(b) At a charge of $2.00 per car if such orders are received in time to permit instructions to be given to yard employes within twenty-four (24) hours after arrival of car at destination, or if the destination is served by a terminal yard, then within twenty-four (24) hours after arrival at such terminal yard.

Except that on shipments of coal originally consigned to accredited Terminal Coal Pool Associations and ordered delivered to final consignee within twenty-four (24) hours after arrival of car at terminal yard, there will be no charge. (To be published only by roads reaching such pool points.)

(c) A charge of $5.00 per car if such orders are received subsequent to twenty-four (24) hours after arrival of the car at destination, of if the destination is served by a terminal yard, then subsequent to twenty-four (24) hours after arrival at such terminal yard.

NOTE.—In computing time, Sundays and legal holidays
47 (National, State and municipal), will be excluded. When a holiday falls on Sunday, the following Monday will be excluded.

Rule 12. Diversion or reconsignment to points outside switching limits after placement: If a car has been placed for unloading at original destination and forwarded therefrom without being unloaded to a point outside of the switching limits, it will be subject to the published rates to and from the point of reshipment, plus five dollars ($5.00) per car reconsignment charge, except that in no case shall the total charge be less than the charge based on the through rate from point of origin to final destination, plus $5.00 per car reconsignment charge.

Rule 13. Diversion or reconsignment to points within switching limits after placement: Cars that have been placed for unloading and which are subsequently reforwarded without being unloaded to a point within the switching limits of the billed destination will not be subject to diversion or reconsignment charge, but will be subject to the switching or local rate in addition to the rate from point of origin to billed destination.

NOTE.—Where no switching tariff is in effect, the charge will be ten (10) cents per ton of 2,000 pounds, minimum five ($5) per car.

Great Northern Railway Company Supplement No. 1 to G. N. Ry. G. F. O. No. 1240-A was marked "Plaintiff's Exhibit D."

48 Mr. SIMPSON. Plaintiff offers in evidence Plaintiff's Exhibit D, being "Supplement No. 1 to G. N. Ry. G. F. O. No. 1240-A," under the same agreement.

The COURT. Received.

Following is a copy of plaintiff's Exhibit D:

Supplement No. 1 to G. N. Ry. W. P. S. C. No. 658.

Supplement No. 1 to G. N. Ry. N. D. R. C. No. 41.

Supplement to No. 1 to G. N. Ry. I. C. C. No. A-4524.

Great Northern Railway Company, Watertown & Sioux Falls Ry. (FX 2, No. 13), Supplement No. 1 to G. F. D. No. 3416.

Supplement No. 1 to G. N. Ry. G. F. O. No. 1240-A.

Refer to the above-numbered tariff naming rules and charges governing diversion or reconsignment of carload freight at stations on the above-named lines, except on intrastate traffic in Minnesota

South Dakota, Wisconsin, Iowa, Montana, and Idaho, and amend as shown herein.

Issued May 1, 1918.

Issued under authority of rule 9–K, Tariff Circular 18–A, and in compliance with Investigation and Suspension Docket No. 1161 of the Interstate Commerce Commission Reconsignment Case (No. 2) of April 29, 1918.

H. H. Brown,
Assistant Traffic Mgr.,
St.Paul, Minn.
Great Northern Ry Co

M. J. Costello,
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Issued by P. H. Burnham, General Freight Agent, Great Northern Ry. Co., St. Paul, Minn.

Edgar E. Clark, Winthrop M. Daniels, Robert M. Woolley, Commissioners.

At a session of Division 2 of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 29th day of April, A. D. 1918.

Investigation and Suspension Docket No. 1161.

Reconsignment case (No. 3).

It appearing that there have been filed with the Interstate Commerce Commission tariffs containing schedules stating new individual and joint charges, and new individual and joint regulations and practices affecting such charges, to become effective on the 1st day of May, 1918, designated as follows:

Great Northern Railway Company: G. N. Ry. I. C. C. No. A–4524.

It is ordered, that the Commission upon complaint, without formal pleading, enter upon a hearing concerning the propriety and lawfulness of the charges, regulations and practices stated in the said schedules contained in said tariffs, viz, the rules and charges governing grain, seed (field), seed (grass), hay or straw, carloads, held in cars on track for inspection and disposition orders incident thereto at billed destination or at point intermediate thereto.

It further appearing, that said schedules make certain increases in charges for the interstate transportation of grain, seed, hay, and straw—carloads—and the rights and interests of the public appearing to be injuriously affected thereby, and it being the opinion of the Commission that the effective date of the said schedules contained in said tariffs should be postponed pending said hearing and decision thereon.

It is further ordered, that the operation of the rules and charges governing grain, seed (field), seed (grass), hay or straw—carloads—

held in cars on track for inspection and disposition orders incident thereto at billed destination or at point intermediate thereto, appearing in said schedules contained in said tariffs, be suspended, and that the use of the said rules and charges, therein stated be deferred upon interstate traffic until the 29th day of August, 1918, unless otherwise ordered by the Commission, and no change shall be made in such rules, charges, regulations and practices during the said period of suspension unless authorized by special permission of the Commission.

It is further ordered, that the charges thereby sought to be changed shall not be increased and the rules, regulations, and practices thereby sought to be altered shall not be changed by any subsequent tariff or schedule, until this investigation and suspension proceeding has been disposed of or until the period of suspension and any extension thereof has expired, unless authorized by special permission of the Commission.

51 And it is further ordered, that a copy of this order be filed with said schedules in the office of the Interstate Commerce Commission, and that copies hereof be forthwith served upon the carriers parties to said schedules, and upon C. E. Bode, A. C. Fonda, F. W. Gomph, and C. H. Griffin, agents, and that said carriers parties to said schedules be, and they are hereby, made respondents in this proceeding, and that they be duly notified of the time and place of the hearing above ordered.

By the Commission, Division 2:

[SEAL.] GEORGE B. MCGINTY,
Secretary.

In compliance with the above order, rules, and charges, provided on lower portion of page 4 of G. N. Ry. I. C. C. No. A–4524, G. F. O. No. 1240–A, are under suspension and will not be applied until August 29, 1918, unless otherwise ordered by the Interstate Commerce Commission.

During period of suspension, no charge will be made on grain, seed (field), seed (grass), hay or straw, carloads, held in cars, on track for inspection and disposition orders incident thereto at billed destination or at point intermediate thereto."

Substitute the following for paragraph (a) under caption "Exception" shown on page 2 of tariff:

(a) Grain, seed (field), seed (grass), hay or straw, carloads, held in cars on track for inspection and disposition orders incident thereto at billed destination or at point intermediate thereto.

52 Q. You say you have been with the Merchants Elevator Company for two years, Mr. Barwin?

A. Yes, sir.

Q. What did you do prior to that?

A. I was in the traffic department of a railroad.

Q. What railroad?

A. The South Dakota Central.

Q. For how long?

A. I was with them for about seven years.

Q. Was that when you started to work, or had you had previous experience?

A. Previous to that I was with the Milwaukee.

Q. How long were you with the Milwaukee?

A. About three years.

Q. Will you state what your experience has been as to the handling, reading, and so forth, of tariffs and other rate matters?

A. I have had quite a good deal. I acted as general freight agent for the South Dakota Central for about two years. Previous to that——

Q. And part of your duties there were handling and reading and filing, and so forth, of tariffs?

A. Yes, sir.

Q. And since you have been with the Merchants Elevator, that has also been a part of your duties?

A. Yes, sir.

Q. In other words, you claim to be a traffic or rate man?

A. Yes, sir.

Q. From your former experience?

A. Yes, sir.

33 Q. Showing you plaintiff's Exhibits C and D, I will ask you if you are familiar with those tariffs?

A. Yes, sir.

Q. Will you state whether or not those are the tariffs in effect, or not in effect, as the case may be, anyway the tariffs covering the charge which is here in dispute with the Great Northern Railroad?

Mr. FINERTY. We will admit they are.

Mr. SIMPSON. And that there were no others?

Mr. FINERTY. We will admit that; that is, so far as these charges are concerned. These do not contain the transportation rate.

Mr. SIMPSON. Yes; I understand that there is no dispute about that. These are the Great Northern tariffs and the only tariffs covering this particular dispute in question.

Q. Will you state, Mr. Barwin, from your experience as a rate and traffic man, what, in your opinion, the charge would be, or if there would be any under the facts as already shown in this case?

Mr. FINERTY. Just a moment, before you answer, Mr. Barwin, Mr. Simpson, just to avoid a complicated record here, in connection with what you just stated, may it be admitted of record that the transportation rate is not involved here, and that the transportation rate collected was the through rate in effect from point of origin to Anoka.

Mr. SIMPSON. Is that right?

WITNESS. The transportation rate—you mean the freight charges?

34 Mr. FINERTY. The freight charges, yes; exclusive of this reconsignment charge.

WITNESS. Yes.

The COURT. This question, as I understand it, relates solely to what the plaintiff claims was an overcharge at Willmar on account of taking the reconsignment charge.

Mr. FINERTY. On account of making the reconsignment charge; that is right.

Mr. SIMPSON. Now, will you answer the question, Mr. Barwin?

Mr. FINERTY. I want to object to the question on the grounds previously specified, which I understand are preserved by my motion to dismiss the case, and on the ground it calls for a conclusion on the part of the witness, and the tariff itself is the best evidence of its application.

Mr. SIMPSON. Expert testimony, your honor.

The COURT. That is the precise thing the court is called upon to determine, isn't it?

Mr. BENSON. Yes.

The COURT. And the court must do it from an inspection of the tariff, must it not?

Mr. SIMPSON. I think it is exactly within the same class of testimony that a jury may consider a personal injury case; the jury may be advised by a doctor as to what the injuries are, and in a case like this it is purely a matter of expert opinion or the opinion of an expert rate man, and it seems to me that it is perfectly proper to
55 have such an expert state to the court simply what his opinion is or what his construction of the tariff is. But, of course, it is for the court to determine whether or not that is correct; it is nothing that is binding on the court at all. Certainly, in a case like this I do not see where the court is going to get any light on the question if the court has to go through the tariff himself without any light from either side as to what their contentions are.

Mr. FINERTY. A question might properly be framed to present the matter so that it would inform the court, but the question now, as I understand it, calls for the conclusion of this witness as to whether or not there is any charge in that tariff applicable to these shipments. The witness might be asked to specify what portion of the tariff he considers relevant to this issue and to point them out to the court, as advising the court, but certainly the negative conclusion of the witness that there is nothing in the tariff is a mere conclusion that is not informing to the court at all. Let the witness state on what grounds he believes that there is no charge applicable.

Mr. SIMPSON. I will have to follow that. Of course, I have got to get some starting place, and then I intend to follow that by asking what part he considers applicable and what other part he does not consider applicable, and why.

The COURT. Waiving the question of the competency of the evidence, the plaintiff has merely in his opening to show a negative state of affairs. I suppose if the defendants were introducing
56 testimony along the same line, it might be entirely proper for the defendants to show why the charge should be made.

Mr. FINERTY. My objection only is, your honor, to any statements by this witness in the nature of a conclusion that no charge is applicable.

Mr. SIMPSON. I am merely asking him to state, as an expert, what his opinion is.

The COURT. I will take it subject to the objection. I am not saying what weight it will have with the court.

A. There is no charge—in my opinion there is no charge.

Q. Now, if you will state first on what you base that opinion, that is, what part of the tariff applies in your opinion, or what parts of the tariff are relevant to the matter here involved.

Mr. BENSON. The same objection is made, your honor, that all of these questions call for the conclusion of the witness.

The COURT. Same ruling. It is taken subject to the objection, subject to be stricken out.

A. Why, this tariff covers the rules and charges governing diversion or reconsignment only.

Q. Where do you find that?

A. We find that on the title-page, and also under the application on page 2.

Mr. BENSON. The witness had better mark the portion.

Mr. SIMPSON. That tariff is marked, I think. I think there are blue lines underlining the portion.

57 Mr. FINERTY. Just as incident to what the witness is stating and the desirability of having it marked, his answer is that the tariff covers diversion or reconsignment only. I would like him to point out on the tariff the word "only." On what do you base the answer that it does that "only"?

Mr. BENSON. Wouldn't it be just as well, for the purpose of the record, to let the witness read into the record the portions of the tariff that he refers to?

Mr. SIMPSON. That is all right. Just read in the portions of the tariff upon which you base your answer.

WITNESS. All right.

Mr. BENSON. From the title page.

WITNESS. All right. "Local and joint tariff naming rules and charges governing diversion or reconsignment of carload freight at stations on the above named lines except on intrastate traffic"——

Q. Just read the material portions.

A. All right. "Minnesota," etc.

Mr. BENSON. That is on the title page?

WITNESS. That is on the title page. On page 2, under the heading "Rules and charges governing the diversion or reconsignment of carload freight;" under the subcaption or subheading "Application": "Freight in carloads, except as provided below, may be diverted or reconsigned on this company's lines, subject to the following rules, regulations, and charges." Under "Exceptions" we find that "These

rules will not apply to: Grain, hay, straw, or grass and field
58 seeds held or stopped for official inspection. (See page 4.)"

In "Supplement No. 1 to G. N. Ry., G. F. O. No. 1240-A," in effect the same day, in the lower portion of the second page——

Q. What are you reading now—the cancellation?

A. Yes; the cancellation.

Q. Hadn't you better take it up in general what page 4 contains first?

A. Well, yes: all right.

Q. Just state in a general way. You need not read all of that. What part of page 4?

A. The lower portion of page 4 we find: "Rules and charges governing grain, seed (field), seed (grass), hay, or straw, carloads, held in cars on track for inspection and disposition orders incident thereto at billed destination or at point intermediate thereto." This goes on and names certain rules that were suspended on the same date that the tariff was made in effect.

The Court. I suggest to counsel at this point in the case, lest I forget it, that the court would be glad to have you point out later on the difference between the terms "official inspection" as used on page 2 under "Exceptions" and the term "inspection" as used in rule 13 on page 4. One is "official inspection" and the other is merely "inspection."

Mr. Finerty. There is no difference so far as this case is concerned.

Mr. Simpson. Not as far as I know.

59 The Court. What occurred to me was that under rule 13, just pointed out, it might merely be held for unofficial inspection by the purchaser.

Mr. Finerty. Rule 13, your Honor, is really not involved in this case. While the heading the witness just read would appear to be under rule 13, it is not really under rule 13. It is a new heading of its own, and properly should have some other number.

The Court. All right. Go ahead.

Mr. Finerty. That is correct, Mr. Witness, isn't it?

Witness. Yes. The lower portion of page 4 was suspended on the same date that the tariff was issued.

The Court. Which part?

Witness. The lower portion, that starts in with "rules and charges governing grain," et cetera. The charges therein were suspended by the commission, and during the period of suspension, as per supplement No. 1 of the above named tariff, on page 2, it is provided that "no charge will be made on grain, seed (field), seed (grass), hay or straw, carloads, held in cars on track for inspection and disposition orders incident thereto at billed destination or at point intermediate thereto."

The Court. I think, gentlemen, we will suspend at this point until Monday morning.

An adjournment was here taken until the morning of Monday, October 27, 1919.

Monday, October 27, 1919, 10 a. m.

Court convened pursuant to adjournment.

60 J. E. BARWIN was recalled and his direct examination resumed as follows:

By Mr. SIMPSON:

Q. Mr. Barwin, will you go on and state as to the application of the lower part of page 4, starting, "rules and charges governing grain, seed" and so forth?

A. The lower part of page 4 has been suspended by the Commission.

Q. That is the part referred to, in your opinion, in the exception?

A. Yes.

Q. Where it says "(See page 4)" From that heading in the middle of page 4 to the bottom of that page 4?

A. It has been suspended. During the period of suspension the supplement provides that no charge will be made.

Mr. FINERTY. Read supplement 1.

WITNESS (reading). "During period of suspension, no charge will be made on grain, seed (field), seed (grass), hay or straw, carloads, held in cars on track for inspection and disposition orders incident thereto at billed destination or at point intermediate thereto."

Q. Have you examined rule 10 of the original tariff, on the bottom of page 3?

A. Yes, I have.

Q. In your opinion, does that rule apply to the shipments in this case?

A. No.

61 Mr. BENSON. These opinions are all taken subject to our objection.

The COURT. Yes.

WITNESS. Rule 10 applies to shipments where they have not been billed to a point for inspection.

Q. Or other commodities, grain, coal, or fresh fruit?

A. Yes.

Q. To make that clear, if a car was billed——

The COURT. I do not think you need spend any time on that point, Mr. Simpson; it is quite apparent.

Q. Then, it is your opinion, from your reading and construction of this tariff, that there is no charge for reconsigning upon shipment—there should be no charge?

A. When they are stopped for inspection?

Q. Yes; in the particular shipments in this case.

A. Yes, sir.

Cross-examination by Mr. FINERTY:

Q. These cars, I believe you testified, were originally consigned from Nebraska and Iowa points to Willmar, Minnesota?

A. Yes, sir.

Q. The point at which they were inspected?

A. Yes, sir.

Q. The original destination, therefore, was Willmar, Minnesota, was it not?

A. Yes, sir.

62 Q. After being inspected at Willmar, Minnesota, the cars were ordered reconsigned to Anoka, Minnesota; is that correct?

A. Yes, sir.

Q. Now, I understood you to say, that, in your opinion, rule 10 of Exhibit C does not apply?

Mr. SIMPSON. Does not apply on cars stopped for inspection.

A. On the cars in this suit, yes; it does not apply on these cars.

Q. Now, assuming that the rules on the bottom of page 4 of the same exhibit to which you refer and the suspension order in Exhibit D were out of this case, rule 10 would be applicable would it not? I am just making that assumption for the time being.

A. I don't quite get you.

Q. Assuming there were no such rules as appear on the bottom of page 4 of Exhibit C and no such statement as you read from Exhibit D, to the effect that during the period of suspension no charge will be made on grain, seed, and so forth, held in cars on track for inspection and disposition orders incident thereto at billed destination or at point intermediate thereto, and that rule 10 were the only rule in this tariff, rule 10 would in terms apply to the reconsignment of this car from Willmar to Anoka, would it not?

A. No. I will tell you why. Your application here provides that freight in carloads may be reconsigned except as provided before, and under exceptions you make an exception of grain, hay, and so forth and so on, do you not?

63 Q. That exception applies to the rules on page 4, does it not?

A. Yes.

Q. Now, I say, leaving the rules on page 4 out of it entirely, rule 10 would apply and the charge under rule 10 would be made?

A. If you did not make an exception, of course.

Mr. SIMPSON. Now, just get that clear. He says if you did not make an exception. But the exception is there. You made no statement about the exception.

WITNESS. You make no statement about the exception.

Q. Supposing there was no exception such as appears there and no rules on page 4 or no suspension order, then rule 10 would apply, would it not?

A. We will assume it would; yes.

Mr. SIMPSON. If there was no exception.

WITNESS. If there was no exception.

Q. Now, the exception to which you refer is the exception (a) on page 2 of Exhibit C, is it not?

A. Page 2 of the tariff 1240-A. I don't know what the exhibit number is.

Mr. SIMPSON. Yes; that is Exhibit C.

Q. And the exception is (a), is it not?

A. Yes.

Q. And "(a)" refers to page 4, does it not?

A. Yes, sir.

Q. If the rules and charges on page 4 had not been suspended, the situation would be this: That if a car had been billed originally to Willmar and was held either at Willmar or at some point between the point of origin and Willmar, the charges specified there would apply if disposition were given?

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Mr. SIMPSON. For official inspection or not?

Mr. FINERTY. For official inspection. Those charges would apply, would they not?

WITNESS. Yes, sir.

Q. And those charges, with the exception of the one specified in rule 3, are less than the charges that would apply under rule 10? That is, a five-dollar charge would apply on rule 10?

The COURT. It might be less or it might be equal.

Mr. FINERTY. Yes; I say with the exception of rule 3, on page 4, the charges would be less.

Q. Now, the situation came about that the commission suspended those rules making these charges where cars were held on track for official inspection. That is right, isn't it?

A. Yes.

Q. Therefore all the charges on page 4 were eliminated from the tariff by the suspension? That is correct?

A. That is correct.

Q. Now, that suspension order as you read it says that "During period of suspension, no charge will be made on grain," et cetera, "held in cars on track for inspection and disposition orders." Now, it does not stop there, does it? It goes on and says, "incident thereto at billed destination or at point intermediate thereto"? That is, it confines the limitation upon disposition orders upon which no charge will be made to "disposition orders incident" to inspection at billed destination or at a point intermediate to billed destination, does it not?

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A. I don't quite understand what you are trying to bring out.

Q. I am trying to bring out this: These cars were billed to Willmar. If the cars had originally been billed to Anoka and held for inspection at Willmar and been ordered to Anoka, there would have been no charge under the suspension order. That is, if the car had been billed to Willmar and disposition was given to some place on track at Willmar, after the cars had been officially inspected, you would have had no charge. Likewise, you would have had no charge if the cars had originally been billed to Anoka as the original destination and held at Willmar, which would have been a point intermediate thereto and disposition after inspection given to Anoka—

you would not have had any charge under either circumstances, would you?

A. Well, that is the way you interpret it.

Q. Well, I am asking you how you interpret it.

A. Well, I have given my interpretation.

Q. I know, but why do you ignore the limitation on the provision "There shall be no charge" where held for official inspection or disposition incident thereto at billed destinations? Now, the billed destination of these cars was Willmar, and if they had been held at Willmar and disposition given to a point at Willmar, you
66 admit there would have been no charge under this tariff, don't you?

A. Yes; there would be no charge.

Q. Also, if they had originally been billed to Anoka and held for inspection at Willmar and disposition then given to Anoka, you admit there would be no charge?

A. If they were held at Willmar you would have charged me five dollars for stopping the car.

Q. No; we would not.

A. On your 440.

Q. No; we would not.

A. That was expressly eliminated and you are ignoring the fact that these cars were billed to Willmar——

Q. Willmar was the destination, and the disposition given at Willmar was not disposition given incident to final inspection at Willmar——

The Court. The court understands the testimony was otherwise—that they were consigned to Willmar for the purpose of inspection. Perhaps I got that from counsel's statement.

Mr. Simpson. No; that is right.

The Court. My understanding of the matter was they were billed to Willmar for official inspection, and there the routing, according to the grade, might be either one of several places.

Mr. Finerty. The point of the matter is, your honor, that you——

Mr. Simpson. No; I don't think you had better make an argument on it.

Mr. Finerty. I don't see why not. I have a right to direct
67 the testimony to a specific point. The point is this: You have shipments billed to Willmar, Minnesota, and they are ordered officially inspected there. Your original destination is Willmar, Minnesota. You have a tariff in effect that says if a shipment is held at its destination or a point incident thereto for official inspection and disposition given incident to that official inspection, there should be no charge. Now, if these cars had been, as they were, originally billed to Willmar and inspected there and disposition given on track, some other track at Willmar, there would have been no charge literally under the tariff. But you must remember that the original destination of these cars was Willmar. They could have been held at any point intermediate to Willmar under the same con-

ditions, or if they had originally been billed to Anoka they could have been held at Willmar for special inspection, and destination given to Anoka without charge. But they did not bill them to Anoka. They wanted the privilege of rebilling those cars when they got to Willmar, either to Anoka, or Minneapolis, or Duluth, as they stated.

The COURT. Your claim is that so far as anything that appears in the original shipment, so far as the carrier was concerned, Willmar was the final shipping point?

Mr. FINERTY. Exactly. And not alone was Willmar the original shipping point, but for their own purposes they made Willmar the original shipping point, the original destination, and even then they could have disposed of those cars, given disposition
68 of them at Willmar without any charge; but you must remember that the exception which they are claiming is a specific exception on a general rule making a charge of five dollars, and the ordinary rule is that an exception is always construed strictly.

Mr. SIMPSON. It is construed strictly against you.

The COURT. I did not mean to go into the law at this time. I was simply trying to get at what the facts were. My understanding of the facts was that the shipment had been made to Willmar for the purpose of inspection. Whether that appeared in notice to the carrier or not the facts do not show.

Mr. FINERTY. No; it did not appear; and it would be immaterial if it did. The fact is they were billed to Willmar and afterwards rebilled to a point beyond, and the charge made is for rebilling to a point beyond; and they claim we have not any right to make that charge under an exception which says that disposition might have been given at Willmar or might have been given at some point intermediate thereto, but may not be given beyond. That is the point.

Mr. SIMPSON. That is your argument.

Mr. BENSON. Let us get the record clear on that point. It is true, is it not, that there was nothing on the original billing to show that the cars were going to Willmar for inspection? There was nothing written on them to that effect?

69 Witness. Will you let me say a word? If you had written on the bill of lading "Stop the car"——

Mr. BENSON. Now, wait a minute.

Mr. SIMPSON. You answer the question just the way you want to. He has asked the witness a question and he won't let him answer it.

Mr. BENSON. Answer the question yes or no.

Mr. SIMPSON. If you can't answer it yes or no, don't answer it.

The COURT. He may answer if he knows.

WITNESS. I don't know. I haven't any idea what was on the original bills of lading that were surrendered.

Mr. BENSON. Then we move, your honor, that the statement of the witness that these cars were billed to Willmar for inspection be stricken out, on the ground that it appears that the witness has no

knowledge of the contents of the bill of lading in that regard, and that any secret intention on the part of the shipper of these cars as to what to do with the cars after their arrival at Willmar is absolutely immaterial and not binding on this defendant.

The COURT. I think the motion should be denied as a statement of what was contained in the bill of lading. It does not necessarily call for that.

Mr. SIMPSON. The witness has already testified——

Mr. BENSON. Just a moment. Do you mean that the statement by the witness as to what this contract is, when it appears that the contract is contained in a written instrument, and he now
70 says he does not know what that instrument contained——

The COURT. No; I do not think that calls for any part of the contract. It simply calls for a statement as to the destination selected by the shipper, which was Willmar.

Mr. BENSON. That is the intention which the shipper had?

The COURT. Yes.

Mr. BENSON. So far as it was communicated to the carrier.

The COURT. It does not appear that it was communicated to the carrier yet.

Mr. SIMPSON. A car of grain can not go through Willmar without being stopped for inspection; it is against the law.

The COURT. Well, go ahead. The last was with reference to the application of rule 10 to a shipment of this character.

Examined by Mr. FINERTY:

Q. Your construction, then, Mr. Barwin, is based entirely upon your contention that rule 10 does not apply to these cars, and that the suspension order, your Exhibit D, eliminates this charge on a car, even where that car was originally billed to Willmar and afterward rebilled to Anoka?

A. Yes, sir.

Mr. FINERTY. That is all.

By Mr. SIMPSON:

Q. The Great Northern pulled these cars from Willmar into Anoka?

71 Yes, sir.

Q. That is, it was not a new carrier at all?

A. No.

Mr. FINERTY. That is admitted.

Mr. BENSON. Does it already appear that they started their transportation on the C., B. & Q?

Mr. SIMPSON. Yes; it appears on the exhibit, and it has already been testified to.

Q. Now, Mr. Barwin, you testified, did you not, to clear up this point, that you issued from your office shipping instructions on cars that were bought?

A. Yes, sir.

Q. And they were shipped and moved in accordance with your orders?

A. Yes, sir.

Q. And that you ordered these cars to Willmar for the purpose of official inspection?

A. Yes, sir.

Mr. BENSON. Just a moment. We object to oral testimony as to those orders, and we object further to any testimony with regard to those orders, on the ground that they cannot be in any way binding upon the carrier in this case, the intention that was communicated by this traffic manager to people he was buying corn from down in Iowa and Nebraska.

The COURT. I hardly think it is a statement of that. I think he may tell the reason for the shipment going to Willmar.

Q. And you also explained, did you not, Mr. Barwin, the
72 reason for that—that is, that you had corn of different grades sold at several different places?

A. Yes, sir.

Q. And you had to get Minnesota inspection on them before you could tell to what locality they were going?

A. Yes, sir.

Q. You started to make some explanation in regard to a question that Mr. Finerty or Mr. Benson asked you, as to what was on the bill of lading.

A. I was going to say, the reason we billed the cars to Willmar, in addition, we have oftentimes billed cars direct through to the ultimate destination of the car, with the notation upon the bill of lading to stop the same at Willmar for inspection and advise us the inspection before they moved the cars on, and we have never been able to get any advice after the car has been stopped until they reached Minneapolis. So the grades are not known to us until the cars actually reached Minneapolis.

Mr. BENSON. Just a moment. The State gives you the inspection, doesn't it?

WITNESS. Very true.

Mr. BENSON. The next morning after the inspection is made?

WITNESS. Yes; but the way you interpret the tariff itself——

Mr. BENSON. When were these transactions that you speak of?

WITNESS. Why, I can bring you lots of them.

Mr. BENSON. You don't know now?

73 WITNESS. I can't give a specific case now; no.

By Mr. SIMPSON:

Q. Go on and finish your explanation.

A. On cars with instructions upon the bill of lading to stop at Willmar for inspection and hold until further orders, why, the cars will come right through, and for that reason we just have to make a back haul of the stuff after it reaches Minneapolis.

Q. That is, with that instruction on the bill of lading they pay no attention to it?

A. They pay no attention to it.

Mr. FINERTY. I object to that. They do not pretend there was any such order on this bill of lading.

Mr. SIMPSON. Mr. Benson was asking him whether there was or not.

The COURT. I do not think it is very important.

Mr. SIMPSON. I do not think it is very important, either; I do not think it has got anything to do with this matter.

Mr. BENSON. I want the record to show that I was asking whether there was any request on the bill of lading to hold. There was a question as to whether the bill of lading contained any notice to the carrier.

Mr. SIMPSON. They were sending them to Willmar for inspection.

The COURT. I think that will clearly appear from the question.

74 JAMES DEVEAU, being duly sworn as a witness on behalf of the plaintiff, testified as follows:

Examined by Mr. SIMPSON:

Q. Your name is James DeVeau?

A. Yes, sir.

Q. What is your occupation, Mr. DeVeau?

A. I am in the claim business, railroad claim business.

Q. And what did you do prior to that?

A. I was traffic manager for two or three concerns here in Minneapolis.

Q. And how long have you been engaged in the grain-shipping business and traffic business?

A. Thirty-five years.

Q. All here in the city of Minneapolis?

A. Most of the time.

Q. And during that time has it been part of your duties to read, handle, and interpret tariffs?

A. Yes, sir.

Q. And you now for some time past have been engaged in auditing freight bills for different firms?

A. Yes.

Q. And reading tariffs and making corrections on rates?

A. Yes, sir.

Q. And overcharges and that kind of thing?

A. Yes, sir.

Q. I will ask you if you have made an examination of plaintiff's Exhibits C and D?

A. Let me see them.

75 Q. 1240–A Great Northern tariff and supplement 1 thereto?

A. Yes, sir.

Q. You have heard the evidence and know the facts in this case, e cars involved in this case?

A. Yes, sir.

Q. Will you state what your opinion is as to whether or not there a charge—proper charge—for reconsigning the cars, as was done this case, under the tariff before you?

The COURT. I think before permitting the witness to answer the estion I will indicate this: That I do not think I will permit the itness to go into detail, as the prior witness did. I think perhaps ne witness is enough, as a rule. Do you intend to submit evidence f a similar character?

Mr. FIXERTY. Yes.

The COURT. I think the question that has been asked will be the nly one permitted, outside of one witness. Otherwise I would rule ut the testimony entirely, because I think it can be presented just s well to the court by counsel discussing the matter with their wit- esses and then giving, in the form of argument to the court, the iews the witnesses have. We have got the view of one witness in eneral, and I think this witness may answer this question, but we ill not go into a detailed examination of the matter.

Mr. SIMPSON. I know that expert testimony is entirely within the iscretion of the court. In view of the fact that this is a rather technical matter, I had prepared to present, in as short form as possible, simply the opinions of some six or seven traffic men that are competent to pass upon this.

The COURT. I think you may go as far as you have with this one nd give his ultimate conclusion, unless you have something to de- elop with some witness that was not gone over by Mr. Barwin, the irst witness.

Mr. SIMPSON. You may answer the question, Mr. DeVeau. I un- erstand that is the court's ruling, that he may answer this one uestion, as to his opinion.

The COURT. Yes; he may answer it.

Q. I asked you whether or not, in your opinion, there is, under he facts in this case, under this tariff, a reconsignment charge.

A. There is no reconsignment charge according to 1240–A on rain held for inspection.

Q. That is, on the cars as the facts show in this case?

A. Yes, sir.

Cross-examination by Mr. FIXERTY:

Q. You did not say what you meant, did you? You mean that, in your opinion, under supplement No. 1 to 1240–A there is not any reconsignment charge?

A. Well, but the exception is here in the original tariff. It says that "These rules will not apply to," exceptions: "Grain."

Q. Now, just a minute. The exception says: "(See page 4.)"?

A. All right.

Q. And page 4, as testified to by the original witness, would apply here if it were not for this suspension order?

A. Not necessarily.

Q. Why not, then?

A. Because it says, "Rules and charges governing grain, seed (field), seed (grass), hay, or straw, carloads, held in cars on track for inspection and disposition orders incident thereto at billed destination or at point intermediate thereto"; and then it goes on and says, "Grain." Over here it says "Grain" is one of the exceptions.

Q. Where does it say "Grain" is one of the exceptions?

A. Right in there [indicating]. "These rules will not apply to grain."

Q. It says the foregoing rules, and these are the exceptions which you are reading.

Mr. SIMPSON. Mr. Finerty is talking about the rules on page 4.

WITNESS. Yes.

Q. Those are the very exceptions under which you claim there is no charge, or under which Mr. Simpson claims there is no charge, because the charges named in those exceptions are canceled by supplement No. 1.

A. Well——

Q. Aren't you aware of Mr. Barwin's opinion of that, and Mr. Simpson's?

A. I am aware of it. I am aware of the fact that other roads are paying it to me.

Q. Other roads are what?

78 A. Are paying this same charge to me.

Q. Confine yourself to the question. Are you aware that the very contention here is that those rules on page 4 would apply to this if not canceled by supplement No. 1, which uses expressly the same language and says that on account of the cancellation there shall be no charge?

A. Of course, the cancellation does the business entirely, but before the cancellation was in there there is an exception which says that these rules will not apply to grain. What does that mean?

The COURT. I do not think you need spend any time on that. I think the court understands that.

Mr. FINERTY. I am sure the court does, but I wanted to show the witness did not, and it is perfectly obvious. That is all.

Mr. SIMPSON. I will call Mr. Adams.

Mr. FINERTY. Have you six more experts like that?

JUDSON F. ADAMS, being duly sworn as a witness on behalf of the plaintiff, testified as follows:

Examined by Mr. SIMPSON:

Q. Your name is what?

A. Judson F. Adams.

Q. What is your occupation, Mr. Adams?

A. I am in charge of traffic for the Armour Grain Company, of Minneapolis.

Q. And what did you do prior to that, Mr. Adams?

A. I was in the railroad service for seventeen years, I believe.

Q. Speak a little louder.

A. I was in the railroad service, for the Northern Pacific, the M. & St. L., and the Milwaukee, for 17 years.

Q. And have your duties during that time been to read and interpret and handle rates and tariffs, and so forth?

A. Yes, sir.

Q. And are you familiar with plaintiff's Exhibits C and D, those two tariffs?

A. Yes, sir.

Q. And do you know the facts in this case?

A. Yes, sir.

Q. In your opinion, under the facts in this case, the cars involved in this case, is there any proper reconsigning charge for the consignment or diversion made in this case?

A. No, sir; I do not think there is a proper charge published for that, under these tariffs.

Cross-examination by Mr. FINERTY:

Q. Mr. Adams, would the reason by which you reached that conclusion be similar to Mr. Barwin's or similar to Mr. DeVeau's? Did you hear Mr. Barwin's examination?

A. Most of it.

Q. You reach that conclusion by considering rule 10 as not applicable?

A. Yes, sir.

Q. And that the cancellation notice under supplement No. 1—that is, Exhibit D—cancels the charge that would otherwise be made by the rules on page 4 of Exhibit C; is that correct?

A. I believe there is one point there that I don't quite agree with the previous witness concerning.

Q. What is that point?

A. The point that I would make is that the only thing——

Mr. SIMPSON. Talk a little louder, please.

WITNESS. The only clause in the tariff 1240–A making it applicable on grain under any consideration is paragraph 6, at the bottom of page 4.

Q. And it is that rule 6 on page 4 that makes the charge inapplicable here?

A. Yes, sir. Rule 6 is suspended along with the rest of the rules on page 4.

Q. That is your interpretation?

A. Yes, sir.

Mr. FINERTY. That is all.

Mr. SIMPSON. I had some other men coming, but I guess they are not here. I will rest. There are three or four other witnesses, but I can use them in rebuttal, if there is going to be any.

Mr. FINERTY. I want to renew at this time, your honor, my motion to dismiss the case for want of jurisdiction, it not appearing that the Interstate Commerce Commission has construed these tariffs, and there is, therefore, no basis upon which the court can proceed.

Mr. SIMPSON. I will make the further remark in regard to that motion, that the Interstate Commerce Commission has already construed it.

The COURT. The motion will be denied.

81 HERMAN J. MEHLS, being duly sworn as a witness on behalf of the defendant, testified as follows:

Examined by Mr. FINERTY:

Q. Will you state your position with the Railroad Administration, Mr. Mehls?

A. My present position is chief tariff clerk in the general freight department at the general offices at St. Paul.

Q. Of the Great Northern Railroad?

A. Of the Great Northern Railroad.

Q. And previous to the Federal control of railroads, what position did you occupy with the Great Northern Railway Company?

A. The same position.

Q. How long have you been with the Great Northern Railway Company?

A. Possibly about fifteen or seventeen years.

Q. During that time have you been continuously employed in the traffic department?

A. Yes, sir.

Q. And have your duties required you to be familiar with the tariffs of that company and to construe and apply them?

A. Yes, sir.

Q. I show you plaintiff's Exhibits C and D, and ask you if you are familiar with them?

A. Yes, sir; I believe I am.

Q. Have you heard the testimony as to the manner in which the cars in suit here were billed?

A. I heard the greater part of it.

82 Q. And are you familiar with the fact that the cars upon which this suit was brought were billed from Iowa and Nebraska points to Willmar, Minnesota?

A. I understand so.

Q. And after arrival at Willmar they were ordered inspected and subsequently reconsigned to Anoka?

A. I understand that to be the case.

Q. And on that basis will you state what charge, if any, is applicable to the cars when reconsigned to Anoka, and the item of the tariffs in question making such a charge?

A. My interpretation is that rule 10, page 3, of the tariff referred to applies.

Q. That is Exhibit C?

A. Yes, sir; it is marked "Plaintiff's Exhibit C."

Q. Are you familiar with the cancellation of the rules on the lower ortion of page 4 of the same exhibit?

A. Yes, sir; with their suspension.

Q. With their suspension. And you are familiar with the provisions of Exhibit D providing that no charge shall be made on grain, nd so forth, "held in cars on track for inspection and disposition rders incident thereto at billed destination or at point intermediate hereto?"

A. I am familiar with that supplement.

Q. Will you explain why, in your opinion, that provision does not pply to these cars?

A. My interpretation is that supplement 1 referred to cancels or suspends the rules shown on page 4 of the original tariff, which were published for the purpose of making a certain charge for the billing of cars of grain, etc., held in cars on track for inspection and disposition orders incident thereto at billed destination or at point intermediate thereto.

Q. That is, Mr. Mehls, that had the cancellation notice of Exhibit D not been published and a car had been billed to Willmar for inspection and disposition given even to a point on track at Willmar after inspection, the charges specified on page 4 of Exhibit C would have applied?

A. Yes, sir.

Q. And that would have applied if the cars had originally been billed to Anoka and held for inspection at Willmar?

A. Yes, sir.

Q. But when that item was canceled by Exhibit D, it canceled any charge on a car billed originally to Willmar and disposition given on track at that point, that is, to some other track at Willmar, or on a car billed to Anoka and held for inspection at Willmar and finally ordered to Anoka?

A. That is my understanding of it.

Q. You, however, consider——

Mr. SIMPSON. I object to the form of the question, the way you start it. I wish you would ask him why he considers it, instead of saying you consider it, because——

Mr. FINERTY. It does not make any difference.

Mr. SIMPSON. Well, ask him why he considers it so.

Q. Will you state why the fact that these cars were not originally billed to Anoka or disposition not given to another point at Willmar, makes the cancellation notice inapplicable to these cars?

The COURT. That is not quite what you meant to say, is it, Mr. Finerty, if I may suggest?

Q. You mean the charges would not apply?

A. That is correct.

Mr. FINERTY. Strike that question out. I will change the question. It is very hard to ask this question without putting it in leading form.

Mr. SIMPSON. That is just what I object to.

The COURT. I assume what counsel meant was why he considers the charge should be made under rule 10 where the final destination was Willmar, when it would not have been made if the final destination had been Anoka, with the privilege of inspection at Willmar on the way.

Mr. FINERTY. Answer the question suggested by the court.

A. I would answer that the rule 10 would apply because the car was reconsigned, and the rules shown on page 4 were not intended and do not appear to me to cover a case where a car is reconsigned in transit.

Q. After arrival at original destination?

A. After arrival at original destination.

Q. And you construe rule 10 as applying where a car is reconsigned in transit before placement after arrival at original destination?

A. Yes, sir.

Q. That is, you construe this rule as applying because these
85 cars had arrived at their original destination, Willmar, and had not been placed at Willmar for unloading?

A. Yes, sir.

Q. And were reconsigned to a point beyond Willmar, Anoka; is that correct?

A. That is correct.

Q. And you construe the rules on page 4, and as suspended by Exhibit D, as not applying because these cars were originally billed to Willmar and were not billed to Anoka, and were rebilled after arrival at their final destination, Willmar, to Anoka; is that correct?

A. That is my construction of the tariff.

Cross-examination by Mr. SIMPSON:

Q. Calling your attention to the title page of Exhibit C. It says they are "Rules and charges governing diversion or reconsignment," does it not?

A. Yes, sir.

Q. Does that say that it covers any other charge, a disposition charge, a hold charge?

A. It does not, because you can not put all those things on a title page.

Q. Aren't you supposed to put on the title page a general statement of all rules or regulations covered by that tariff, and don't you do it?

A. I consider the statement on that title page adequate to cover the tariff.

Q. Would you figure that that would cover refrigeration charges, or something like that, too?

Mr. BENSON. That is objected to as immaterial. If the
86 designation is not sufficient on the title page, that is purely a matter for the Commission.

The COURT. I don't suppose the rule applies——

Mr. SIMPSON. I just want to show, when they talk about reconsignment and diversion, it is all the same thing; that is all.

Q. Now, we will suppose that supplement No. 1 had not gone into effect, Mr. Mehls; supposing this supplement No. 1 had not gone into effect at all, and cars were billed the same as they were in this case, and were held at Willmar for inspection; then under that tariff there would have been a two-dollar charge, would there not, for holding?

A. I understand there would; yes, sir.

Q. Then you reconsign the cars to Anoka and there would have been another five dollars for reconsignment?

A. That is correct.

Q. Yes, that is correct. That is seven dollars. Now, if we had billed those cars to—what is a town on your line where there is no official inspection?

A. Litchfield.

Q. If we had billed those cars to Litchfield with orders to hold, and you held them there, then we reconsigned them to Anako, there would be a five-dollar charge, wouldn't there?

A. There would be for reconsigning them.

Q. So, in other words, if we billed to the initial inspection point it costs us two dollars more than if we billed it to some other town, under your construction of that tariff?

87 A. That would be the case if the rule had not been suspended.

Q. That would have been the case?

Mr. FINERTY. It was intended to be, wasn't it?

WITNESS. Yes.

Q. And as a matter of fact, at Willmar, or any inspection point, you set out every single car of grain that comes in there, don't you?

Mr. BENSON. That is objected to as not proper cross-examination.

Objection sustained.

Q. Now, you say that rule 10 applies in this case. Now, calling your attention to "Exceptions." It starts out and says, "These rules will not apply to," and then goes on and designates "grain," doesn't it? "These rules will not apply."

A. Yes, sir.

Q. That is what it says. When they say, "These rules," what does that mean? Which rules?

A. The rules in the first portion of the tariff here.

Q. What are the numbers?

A. One to 13, inclusive.

Q. Yes. And it say that "These rules will not apply," and that includes rule 10, doesn't it?

A. That is correct.

Q. To "Grain, hay, straw, or grass and field seeds held or stopped for official inspection." That is what it says, isn't it?

A. Well, it didn't say that. That rule is amended. "Grain, seed, hay, or straw, carloads, held in cars on track for inspection and disposition orders incident thereto at billed destination or at
88 point intermediate thereto."

Mr. BENSON. You are reading from the last paragraph marked "(a)," on plaintiff's Exhibit D?

WITNESS. Yes.

The COURT. That is the supplement.

WITNESS. Yes, sir; that is the supplement.

Q. And it says, "disposition orders incident thereto"?

A. That is correct.

Q. That is the only difference in the rule I was reading from?

A. Yes; that is correct.

Mr. BENSON. It says, "at billed destination or at point intermediate thereto"?

WITNESS. Yes.

Mr. SIMPSON. There is no dispute but what this is the billed destination at Willmar.

Mr. FINERTY. The dispute is that there was billed disposition at Willmar. It is Anoka.

Mr. SIMPSON. You say it does say that?

Mr. FINERTY. It does.

Mr. SIMPSON. You say it does, and I say it does not.

Q. When it says "These rules will not apply to," it covers rule 10?

A. This does not refer to rule 10.

Q. "These rules will not apply," that includes rule 10, doesn't it?

A. Yes; that is correct.

Q. Now, calling your attention to rule 6, at the bottom of page 4, which is printed in very bold type, more so than the rest of it,
89 "If grain, hay, straw, field seed or grass seed, carloads, is held on track except for official inspection, the general diversion and reconsigning rules published herein will apply." In other words, if it is for anything except "official inspection," then this rule 10 will apply?

A. That is what it says.

Q. Are you familiar with Docket 1161 of the Interstate Commerce Commission, in which they hold these charges illegal?

Mr. BENSON. Objected to as not proper cross-examination.

The COURT. I think it is proper cross-examination, Mr. Benson, if it is what the question purports to be.

Mr. BENSON. I do not think the witness, even on cross-examination, can state his conclusions of law as to the effect of a decision of either a court or a commission.

Mr. FINERTY. Just to show how misleading the question is——

Mr. SIMPSON. I asked him if he was familiar with it.

Mr. FINERTY. Wait a moment. You asked him if he was familiar with a decision of the Interstate Commerce Commission holding these charges illegal.

Mr. SIMPSON. I said Docket 1161.

Mr. FINERTY. These charges referred to are the five-dollar charge which we contend is applicable under rule 10, and the decision of the Interstate Commerce Commission to which Mr. Simpson
90 refers is the one finally canceling the charges suspended on page 4, that we say have nothing to do with this case.

The COURT. Well, of course, if the premises in the question are wrong——

Mr. FINERTY. The premise is not only wrong, but it is false.

Mr. SIMPSON. In your opinion, but the Rock Island, Omaha, and Soo all agree with me.

The COURT. Unless the circular referred to by counsel is a ruling on the precise point, I do not think it is proper cross-examination.

Q. You are familiar with that docket, 1161, called "Reconsignment case No. 3"?

A. I don't remember the document.

Q. You have never seen that decision that has come out by the Interstate Commerce Commission, the final decision on this suspension order?

A. I do not recall that I have seen it.

Q. You know there is such a decision?

Mr. FINERTY. I will admit that a decision has been made, and I am willing to have the decision filed in this court.

Mr. SIMPSON. I want to show by this man whether he knows that this decision, 1161, is the final decision in this matter.

Mr. BENSON. There is no foundation.

Mr. SIMPSON. I am trying to lay one. If he knows anything, jiminy cricket, he ought to keep up with his own rates, he is such an expert over there.

91 Mr. FINERTY. Mr. Mehls apparently does not know, but I will admit that the decision to which counsel refers is the decision suspending the—finally suspending—the rules on the lower part of page 4 of Exhibit C.

Mr. SIMPSON. The tariff involved was 1240. It is the same as the suspension of 1, isn't it? It is the final decision.

Mr. FINERTY. It is the final decision on supplement 1, but refers only to the rules on the lower portion of page 4, which have nothing to do with rule 10.

Mr. SIMPSON. The tariff is 1240 A.

The COURT. It is a continuation of the suspension already indicated in Exhibit D?

Mr. SIMPSON. Yes; it is the final decision. I just want to identify the tariff, that is all.

Examined by Mr. FINERTY:

Q. Mr. Mehls, I just want to make clear to the court that, in your opinion, the exception "(a)," reading "These rules will not apply to: (a) Grain, hay, straw, or grass and field seeds held or stopped for official inspection," is modified by supplement 1; so that at the time these cars moved, the way that exception properly read, as modified by supplement 1, was: "Exceptions: These rules will not apply to grain, seed (field), seed (grass), hay, or straw, carloads, held in cars on track for inspection and disposition orders incident thereto at billed destination or at points intermediate thereto"?

A. (After examining the papers.) That is my understanding, Mr. Finerty.

92 Q. That is, that which might have been a broad exception of all cars held for official inspection under the exceptions as they originally read in Exhibit C, was limited by supplement 1 which was in effect at the time these cars moved, so as to apply only to cars held on track for inspection and disposition orders incident thereto at billed destination or at points intermediate thereto?

A. That is correct.

Q. And therefore, you construe the rule 10 as applicable because this car was not held for disposition incident to official inspection at final destination or at a point intermediate to final destination?

A. That is correct.

The defendant then rested.

Mr. FINERTY. I renew my motion to dismiss the case, for want of jurisdiction.

The COURT. I have examined some of the cases cited by counsel on that proposition. I am inclined to think the court has jurisdiction, and I expect to go further into the decisions cited by counsel.

Assuming the court has jurisdiction, it seems to me that the question resolves itself into what should be the rule to apply if the final destination is an official inspection point and the carrier has no official notice of the fact that it is going there for inspection and possibly reconsignment. Should not the carrier be charged with knowledge that that is an official inspection point and that in all probability it will be reconsigned?

93 There would not be any question about this case at all, would there, that this charge would not apply, if, for instance, the railroad company had been notified that the grain was being sent to Willmar for official inspection and would be reconsigned or disposition made at that place? There would not be any question, would there, about the application, or the nonapplication, rather, of the rule, if such were the case?

Mr. FINERTY. Still, if it had been billed to Willmar, without any indication as to its final destination, I would say that the charge would apply. In other words, your honor, tariffs must be strictly complied with. That is the only way in which, of course, you can prevent favors being given one shipper that can not be given to

another. There must be literal compliance with the tariff. We contend the charge is literally applicable where the car is consigned to Willmar and disposition not given at Willmar but to a point beyond Willmar. If the car had been consigned to Anoka, inspection made at Willmar and disposition given to Anoka, then literally the charge would not have been applicable. You have to find just exactly under what conditions the tariff applies, and apply those conditions, irrespective of whether they are reasonable or unreasonable.

Mr. BENSON. To answer the specific question of the court: Is it true, Mr. Simpson, that you can consign a car, for instance, to Willmar, with the privilege of ordering it out on the same bill of lading to some other point?

94 Mr. SIMPSON. No; you can not do that. The only way you can handle it is just exactly the way we handled it.

Mr. FINERTY. The car could have been consigned to Anoka—they admit that themselves—held for inspection at Willmar and disposition of Willmar.

Mr. SIMPSON. No; we can not consign it to Anoka, because we don't know where it is going.

Mr. FINERTY. That is exactly the point, and they had to do that because of their business necessities, but they had a right to do it only under the conditions that the tariff provided. They can not make their conditions to meet their business necessities. Those conditions are fixed by the tariff.

The COURT. Now, here is a circular, Exhibit C, which purports to make certain rules and charges. The part beginning in the middle of page 4 was suspended. Isn't it fair to assume that what is covered by that portion of the circular beginning in the middle of page 4 was not intended to be covered by any of the preceding portions of the same circular?

Mr. FINERTY. That is just exactly what we say, your honor, and we say, therefore, the suspension of these charges on page 4 should not in any way affect rule 10 over here [indicating].

Mr. SIMPSON. Rule 10 does not apply at all.

The COURT. You say in the exceptions that the rules 1 to 13 do not apply to grain.

Mr. FINERTY. This is the cancellation notice down to here.

95 As this read there is force to the argument made by Mr. Simpson, that all grain held for official inspection, held or stopped for official inspection, was exempted from these rules. The carriers corrected their tariff, by providing: "Substitute the following for paragraph (a) under caption 'exception' shown on page 2 of tariff: '(a) grain, seed, hay or straw, carloads, held in cars.'" Now, it is only one certain kind of grain that is exempted from these rules—"Grain * * * held in cars on track for inspection and disposition orders incident thereto at billed destination"—that is, at Willmar, "and disposition orders incident thereto" at Willmar, which

this was not. This was a disposition order to Anoka, "or at point intermediate thereto"—that is, at some point intermediate thereto. They might have given disposition to Willmar. That was not done. It was to a point beyond. That is, if it be admitted that there is force in Mr. Simpson's argument before the publication of this modifying rule of supplement 1, this rule entirely eliminates from the exceptions all cars except those held at destination or at a point intermediate thereto for disposition for official inspection. These cars were neither.

The COURT. Before a car is finally put to the unloading platform or place, but has reached its destination, isn't it awaiting disposition orders?

Mr. FINERTY. Yes, exactly. And disposition orders at a certain point. It says, "disposition at billed destination or at point intermediate thereto." When we hold cars for inspection, they are
96 held on certain tracks from which delivery can not be taken, and if these cars had been held at Willmar for inspection, held on track for inspection, and these plaintiffs had wanted them delivered at some mill at Willmar, we would have had to make that delivery without charge. That would have been disposition incident to official inspection at Willmar, which was the billed destination. But they can not be held at Willmar and ordered to a point beyond without applying this rule, which says that, under these circumstances, "If a car is diverted, reconsigned or forwarded on orders placed with local freight agent or other designated officer after arrival of car at original destination, but before placement for loading, or if the original destination is served by a terminal yard, then after arrival at such terminal yard, a charge of $5.00 per car will be made."

Mr. BENSON. The question of disposition at terminals is all covered by tariffs; so it is a well established proposition.

Mr. FINERTY. I do not want to argue on academic questions. I would have contended that even without this change in the exceptions, that this exception was limited to the conditions specified on the lower part of page 4, but that would have been a weaker case. But here you have exactly that thing done by a specific tariff provision, published as regulated by law.

The COURT. Your contention is that even though the shipper had said, I am sending those cars to Willmar to be officially inspected, and after they are inspected I will tell you what to do with
97 them, even in that case it is your contention that there would be a further charge under rule 10.

Mr. FINERTY. Unless what he tells us to do with them was to deliver them at some place at Willmar.

The COURT. Unless he told you by selecting another final destination.

Mr. FINERTY. Yes.

The COURT. Which would appear in the bill of lading.

Mr. FINERTY. Yes. And they say that does not appear to be the case here.

Mr. SIMPSON. Of course the court is familiar with the proposition laid down dozens of times by the Interstate Commerce Commission that in case of any ambiguity the tariff must be construed against the railroad company and in favor of the shipper, and hence if there is any ambiguity in this tariff at all, we are entitled to the benefit of it. And the second point I want to call the court's attention to is what Mr. Mehls admitted on the stand, the preposterous position they take in their construction of the tariff, which they are forced into, and that is, if you hold a car at an official inspection point and reconsign it, it costs you seven dollars, but if you hold it at any other point of reconsignment it costs you five dollars. In other words, they say this reconsigning is an additional charge, as Mr. Mehls testified. He said that in that case, if they held this car at Willmar and sent it on to Anoka before this was canceled, that that would be a
98 seven-dollar charge, but if they held it at Litchfield, which is not a sampling point, and sent it on to Anoka, it would only be five dollars. That on its face is foolish.

Mr. FINERTY. I don't know whether Mr. Mehls understood your question or not. But that would not be my construction of the tariff.

Mr. SIMPSON. No, you and Mr. Mehls disagree about that.

Mr. FINERTY. But why argue about something that is canceled out of the tariff? Confine yourself to what is in the tariff and have all the ambiguities resolved against us that you want, and you cannot remove the specific commands of the tariff. There are no ambiguities in the tariff.

The COURT. I am still inclined to think that what governs is the answer to the question: Is it the fact that the company has knowledge that the grain is going there for inspection, or is it the fact that it is going there?

Mr. SIMPSON. Your Honor, they must have knowledge, for the reason that the laws of Minnesota make it a sampling point, and every car of grain that goes in there must be officially examined there, under the laws of the State of Minnesota. They must have knowledge that it goes there for that purpose.

The COURT. It might not go there for that purpose. It might go there for market.

Mr. SIMPSON. We might open the case and show there is no market there.

Mr. BENSON. That would not be material anyway.

99 Mr. SIMPSON. But the testimony is that was the reason it was sent there, and the State law makes it an official sampling station, and it must have been known that is what it was sent there for.

Mr. BENSON. On what points does the court want briefs?

The COURT. I understand counsel wanted to submit something on the question of the jurisdiction of the court.

Briefs to be submitted within thirty days.

(Title of cause.)

STIPULATION FOR SETTLED CASE.

It is hereby stipulated, by and between the parties to the above-entitled action, by and through their respective attorneys, that the foregoing is a true, full, and correct transcript of the evidence offered and proceedings had upon the trial of the above-entitled action, except plaintiff's Exhibits A, B, C, and D, which exhibits are in the possession of counsel, and will be filed with the clerk at the time of the settlement of the foregoing proposed case; and the said transcript, together with said exhibits, may be signed, certified, settled, and allowed as and for a settled case herein, containing all evidence offered and proceedings had upon the trial of said case.

HAROLD G. SIMPSON,
Attorney for Plaintiff.
JOHN F. FINERTY and
DILLE, HOKE, KRAUSE & FAEGRE,
Attorneys for Defendants.

100 (Title of cause.)

ORDER SETTLING CASE.

Having examined the foregoing transcript of evidence together with the evidence received on the trial of the above-entitled action, and having found the same conformable to the truth, the same is, pursuant to the foregoing stipulation of the parties, hereby signed, settled, certified, and allowed, as and for a settled case herein, and I hereby certify that the same contains a true and correct transcript of all of the evidence and proceedings had and the rulings upon said trial.

Dated March 6th, 1920.

By the Court,

MATHIAS BALDWIN, *Judge.*

(Title of cause.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This matter came on to be heard before the court, without a jury, on October 24, 1919, upon issues raised by the complaint of the plaintiff and the answer of the defendants.

Harold G. Simpson, Esq., appeared for the plaintiff; John F. Finerty, Esq., John A. Benson, Esq., and Messrs. Cobb, Wheelwright & Dille appeared for the defendants, and the court, having heard the evidence, the arguments of counsel, and being fully advised in the premises now makes the following findings of fact and conclusions of law:

101 FINDINGS OF FACT.

I.

That plaintiff is a duly organized and existing corporation and that defendants United States Railroad Administration, Walker D. Hines, Director General of Railroads, during the times hereinafter mentioned were in control and operation of the lines of defendant Great Northern Railway Company, and that defendants are and were at the times herein mentioned common carriers of goods for hire.

II.

That plaintiff made certain shipments of corn, as shown in the following schedule:

III.

Date of shipment.	Car No. and initial.	Point of origin.	Date of payment of charges.
8/2/18	N. H. 79564	Council Bluffs, Iowa	8/24/18
8/2/18	D. R. G. 66027	" " "	8/27/18
8/3/18	M. H. 85554	" " "	8/28/18
8/2/18	N. Y. C. 208119	Omaha, Neb	8/28/18
8/3/18	Pa. 40371	Council Bluffs, Iowa	8/26/18
8/3/18	I. C. 172472	Omaha, Neb	8/29/18
8/3/18	I. C. 21133	Council Bluffs, Iowa	8/24/18
8/7/18	G. T. 25357	" " "	8/21/18
8/6/18	Mo. P. 31724	" " "	8/24/18
7/27/18	Big 4—6195	" " "	8/13/18
8/7/18	B. M. 1300	" " "	8/24/18
8/7/18	P. & E. 45929	" " "	8/24/18
8/6/18	C. G. W. 22222	" " "	8/24/18
7/30/18	A. C. L. 43725	" " "	8/16/18
7/31/18	C. R. G. & P. 14344	" " "	8/20/18
7/30/18	G. T. 102796	" " "	8/19/18

III.

That all said shipments were billed by the plaintiff to Willmar, Minnesota, for the purpose of there having an official sample made and the grade placed thereon by the Federal and State sam-
102 pling department and for no other purpose; that Willmar, Minnesota, has been for a number of years an official sampling and inspection point, which defendants well knew, and defendants knew or should have known that said cars of corn were billed to Willmar, Minnesota, solely and only for the purpose of having an official inspection and grade made of the same.

IV.

That on the same day on which plaintiff received the official grade, plaintiff gave disposition orders on said cars to Anoka, Minnesota, by surrendering the original billing and receiving in exchange therefor billing to Anoka, Minnesota.

V.

That the Great Northern Tariff G. F. O. 1240A–I. C. C. No. A4524 and supplement one (1) thereto were the tariffs and the only tariffs which governed or provided for any charge for diversion, reconsigning, or disposition of said shipments; that plaintiff did everything for the proper disposition or diversion of said cars, and that plaintiff paid the lawful and legal freight charges on all said cars.

VI.

That in addition to the lawful and legal charges for the line haul of said cars, defendant exacted, notwithstanding plaintiff's protest, an additional charge of five (5) dollars on each and every one of said cars, on account of the disposition or diversion of said cars
103 from Willmar to Anoka, Minnesota; that defendants had no tariff authority for making such charge of five ($5.00) dollars per car, and that said charges have not been refunded.

CONCLUSIONS OF LAW.

That the charge of five ($5.00) dollars for disposition or diversion, collected from the plaintiff by defendants on each and every one of said cars was illegal and unlawful, and that plaintiff have and recover against defendant herein, United States Railroad Administration, Walker D. Hines, Director General of Railroads, five ($5.00) dollars on each and every one of said cars, or a total of eighty ($80.00) dollars, together with five and 75/100 ($5.75) dollars interest, together with plaintiff's costs and disbursements herein.

Let judgment be entered accordingly.

Dated 6th day of February, 1920.

MATHIAS BALDWIN,
Judge of said Court.

30 days' stay. M. B.

Filed Feb. 10, 1920. Harry Moore, clerk, by C. A. Eck, deputy.

(Title of cause.)

NOTICE OF MOTION FOR NEW TRIAL.

You will please take notice: That at the chambers of Honorable Mathias Baldwin, one of the judges of said court, on the 12th day of March, 1920, at two o'clock p. m., or as soon thereafter as counsel can be heard, the defendants herein will apply to said court
104 for an order vacating and setting aside the findings herein and granting a new trial in this action and upon all the files and records herein, and said motion will be based upon the following grounds:

1. That said findings and decision of the court made and filed herein are not justified by the evidence.

2. That said findings and decision are contrary to law.

3. That the court erred in denying the defendants' motion made upon the pleadings and the opening statement of plaintiff's counsel to dismiss the case for want of jurisdiction.

4. That the court erred in denying the defendant's motion made at the close of the plaintiff's case to dismiss the case for want of jurisdiction.

5. That the court erred in failing to grant the defendants' motion made at the close of all the testimony to dismiss the case for want of jurisdiction.

You will please take notice that at the same time and place the defendants will apply to the court for an order allowing as a settled case herein the proposed case heretofore served upon you, with such amendments as you may propose and the court allow.

JOHN F. FINERTY and
DILLE, HOKE, KRAUSE & FAEGRE,
Attorneys for Defendants.

105 (Title of cause.)

ORDER DENYING MOTION FOR A NEW TRIAL.

The above-entitled matter, being regularly upon the special term calendar of the above court, came on for hearing before the undersigned, one of the judges of said court, on the 12th day of March, 1920, at 2 o'clock p. m., Messrs. John F. Finerty and Dille, Hoke, Krause & Faegre, appearing as attorneys for defendants, in support of a motion for a new trial, and Mr. Harold G. Simpson appearing as attorney for plaintiff, in opposition thereto. The motion was based upon the settled case and upon the grounds set forth in the moving papers on file. The court having heard the arguments of counsel and having been duly advised in the premises,

It is hereby ordered that said motion be, and the same hereby is, in all respects, denied.

Dated this 12th day of March, 1920.

30 days' stay is hereby granted.

By the court.

MATHIAS BALDWIN,
Judge.

Filed March 12, 1920.

(Title of cause.)

NOTICE OF APPEAL TO SUPREME COURT.

To Harold G. Simpson, Esq., attorney for the above-named plaintiff and to Harry Moore, clerk of said court:

106 Please take notice, that the above-named defendants appeal to the Supreme Court of the State of Minnesota, from that certain order of the said court entered herein, on the 12th day of

March, A. D. 1920, denying defendants' motion for a new trial and from the whole thereof.

Dated this 10th day of April, A. D. 1920.

DILLE, HOKE, KRAUSE & FAEGRE,
JOHN F. FINERTY, and
M. L. COUNTRYMAN,
Attorneys for Defendants, 300 Security Building, Minneapolis, Minnesota.

(Title of cause.)

STIPULATION WAIVING APPEAL BOND.

Whereas the defendants herein have served upon the above-named plaintiff a notice of appeal to the Supreme Court from the order of the trial court herein denying defendants' motion for a new trial; and

Whereas defendants have requested that plaintiff waive the statutory bond upon such appeal,

It is hereby stipulated by and between the parties, by and through their respective attorneys, that a statutory bond on appeal be, and the same hereby is, waived, and it is stipulated that each and all of the proceedings upon appeal may be taken and maintained with the same force and effect as if the defendants had provided and
107 filed an appeal bond in the usual and statutory form.

LANCASTER, SIMPSON, JUNELL & DORSEY and
HAROLD G. SIMPSON,
Attorneys for Plaintiff.
DILLE, HOKE, KRAUSE & FAEGRE,
JOHN F. FINERTY, and
M. L. COUNTRYMAN,
Attorneys for Defendants.

108 In Supreme Court, State of Minnesota.

MERCHANTS ELEVATOR COMPANY, PLAINTIFF-RESPONDENT,
vs.
GREAT NORTHERN RAILWAY COMPANY and UNITED STATES Railroad Administration, Walker D. Hines, Director General of Railroads, defendant appellant. } 21910.

It is hereby stipulated by and between the parties to the above entitled action, by and through their respective attorneys, that the time within which the appellant may serve and file the printed record and appellants' brief herein, may be extended by the Supreme Court to and including the 1st day of July, 1920.

DILLE, HOKE, KRAUSE & FAEGRE,
Attorneys for Appellant.
HAROLD G. SIMPSON,
Attorneys for Respondent.

ORDER.

Upon reading and filing the foregoing stipulation,
It is hereby ordered that the time within which appellant may serve and file the record and appellants' brief herein be, and the same hereby is, extended to and including the 1st day of July, 1920.
Dated this 8th day of June, 1920.

CALVIN L. BROWN,
Chief Justice.

In Supreme Court, State of Minnesota.

MERCHANTS ELEVATOR COMPANY, PLAINTIFF-RESPONDENT,
vs.
GREAT NORTHERN RAILWAY COMPANY and UNITED STATES Railroad Administration, Walker D. Hines, Director General of Railroads, defendant appellant. } 21910.

It is hereby stipulated by and between the parties to the above entitled action, by and through their respective attorneys, that the time within which the appellant may serve and file the printed record and appellant's brief herein, may be extended by the Supreme Court to and including the 10th day of July, 1920.
Dated this 28th day of June, 1920.

DILLE, HOKE, KRAUSE & FAEGRE,
Attorneys for Appellant.
HAROLD G. SIMPSON,
Attorneys for Respondent.

ORDER.

Upon reading and filing the foreging stipulation, and the attached affidavit,
It is hereby ordered, that the time within which appellant may serve and file the record and appellants' brief herein be, and the same hereby is, extended to and including the 10th day of July, 1920.
Dated this 1st day of July, 1920.

CALVIN L. BROWN,
Chief Justice.

In Supreme Court, State of Minnesota.

MERCHANTS ELEVATOR COMPANY, PLAINTIFF-RESPONDENT,

vs.

GREAT NORTHERN RAILWAY COMPANY and UNITED STATES Railroad Administration, Walker D. Hines, Director General of Railroads, defendant appellant. | 21910.

STATE OF MINNESOTA,

County of Hennepin, ss:

J. B. Faegre, being first duly sworn, upon oath deposes and says: That he is one of the attorneys for the appellant in the foregoing entitled action.

That said action was tried in the trial court by one John F. Finerty, who then had sole charge of said action; that about the time the appeal herein was taken, said Finerty removed his residence to Washington, D. C. and, thereupon, one F. G. Dorety, one of the attorneys for appellant, took charge of said appeal; that in the preparation of a record and appellants' brief herein it has become necessary to confer with said Finerty and that delay in the preperation of said record and appellants brief has been occasioned by the absence of said Finerty.

That said appeal brief and record, according to affiant's information and belief, can be prepared and made ready, served and filed on or before July 10, 1920.

This affidavit is made in support of an application for an order extending the time within which the record and appellants' brief herein may be served and filed.

J. B. FAEGRE.

110 Subscribed and sworn to before me this 29th day of June, 1920.

[SEAL.] ALICE H. HANSEN.
Notary Public, Hennepin County, Minnesota.

My commission expires July 6, 1920.

Municipal Court, Hennepin Co.

#28.

21910.

MERCHANTS ELEVATOR COMPANY, RESPONDENT,

vs.

GREAT NORTHERN RAILWAY COMPANY AND UNITED STATES RAILROAD Administration, Walker D. Hines, Director General of Railroads, appellants.

HALLAM, *J.:*

SYLLABUS.

1. Under the applicable tariffs, defendants were not entitled to exact a reconsignment charge, on shipments of grain, held in car

on track at billed destination for inspection and disposition orders incident to such inspection, and after inspection reconsigned to another station.

2. The State courts have jurisdiction to construe a tariff filed with the Interstate Commerce Commission, even though it has not been officially construed by the Commission.

Affirmed.

OPINION.

Plaintiff shipped sixteen cars of corn over the Great Northern Railway from Omaha, Nebraska, to Willmar, Minnesota. Willmar is an official sampling and inspection point for grain. The cars were billed to Willmar solely for the purpose of inspection and grading, and when they arrived at Willmar they were held on track for that purpose. When plaintiff received the official grade, it reconsigned the cars from Willmar to Anoka. Defendants thereupon exacted a reconsignment charge of $5 per car. Plaintiff contended that this charge was unlawful and brought this suit to recover the amount paid. The court decided for plaintiff and defendants appeal.

Defendants contend that the charge is authorized by rule 10, which is part of the published tariff known as tariff #1240–A. Rule 10 reads as follows:

"Rule 10. Diversion or reconsignment to points outside switching limits before placement.—If a car is diverted, reconsigned, or reforwarded on orders placed with local freight agent or other designated officer after arrival of car at original destination, but before placement for unloading, or if the original destination is served by a terminal yard, then after arrival at such terminal yard, a charge of $5.00 per car will be made if car is diverted, reconsigned, or reforwarded to a point outside of switching limits of original destination."

Plaintiff contends that the case is within the exception known as exception (a) as amended by supplement #1. This exception provides that these rules (including rule 10) shall not apply to:

"(a) Grain, seed (field), seed (grass), hay or straw, carloads, held in cars on track for inspection and disposition orders incident thereto at billed destination or at point intermediate thereto."

The cars in controversy were "reconsigned" on orders placed at Willmar after the arrival of the car at that point, and rule 10 authorized the charge of $5 per car which was exacted by defendant unless the case is brought within the exception above quoted. The whole issue, therefore, is as to the meaning of the language of the exception. We think the case is within the exception. We construe the exception to mean that cars of grain are exempted from rule 10, if held on track at billed destination for inspection and for disposition orders incident to such inspection, and that the "disposition order" may be an order to make disposition by way of reconsignment to another destination. This seems to us the fair meaning of the language. The purpose doubtless is to permit inspection of grain

at inspection points for the purpose of determining the ultimate market and then to dispose of the shipment by reconsignment to such market without extra charge.

It follows that the exaction of the $5 reconsignment charge was improper.

2. Defendants contend that the courts of this State have no jurisdiction to construe a tariff filed with the Interstate Commerce Commission in advance of its construction by the Interstate Commerce Commission. This question was determined adversely to defendants' contention in Reliance Elevator Co. v. Chicago, M. & St. P. Ry. Co., 139 Minn. 69. Nothing has occurred since that time to change the situation. We find no occasion to overrule our former decision.

Order affirmed.

112 STATE OF MINNESOTA, *ss:*

Supreme Court.

MERCHANTS ELEVATOR COMPANY, PLAINTIFF AND RESPONDENT,

against

GREAT NORTHERN RAILWAY COMPANY and WALKER D. HINES, Director General of Railroads, defendant- and appellant-.

COSTS AND DISBURSEMENTS.

Statutory costs	$25.00
Printing record	$
Printing brief	$23.50
Clerk District Court for making return ($5.00)	$
Clerk Supreme Court for filing return ($10.00)	$
— Affidavits (25 cents each)	$
Postage and express	$
Transcript of case used only for appeal to Supreme Court, and not used in motion for a new trial	$
Premium on appeal bond	$
—— ——	$

The above bill of costs and disbursements taxed and allowed Dec. 15th, 1920, at $48.50

HERMAN MUELLER,
Clerk Supreme Court of Minnesota,
By P. O. SCOW,
Deputy.

STATE OF MINNESOTA,
County of Hennepin, ss:

Harold G. Simpson, being first duly sworn, deposes and says, that he is one of the attorneys for the plaintiff in the above entitled action; that the foregoing is a true and correct statement of the costs and disbursements of said plaintiff in the above entitled proceeding

and that all of the items of such disbursements have been actually and necessarily paid or incurred therein, by and on behalf of said plaintiff.

HAROLD G. SIMPSON.

Subscribed and sworn to before me, this 11th day of December, 1920.

RUBY M. REITER,
Notary Public, Hennepin County, Minn.

My commission expires November 5, 1926.

SIR: Please take notice. That the costs and disbursements of the plaintiff in the above entitled action will be taxed by and
113 before Herman Mueller, clerk of the Supreme Court of Minnesota, at his office in the capitol, at St. Paul, Minnesota, on Wednesday, the 15th day of December, 1920, at 10 o'clock in the forenoon of said day, and that the foregoing is a statement of the items of costs and disbursements that will then and there be claimed on behalf of said plaintiff and inserted in a judgment in said action that will then and there be entered.

Very respectfully,

HAROLD G. SIMPSON,
Attorney for Plaintiff.

To F. G. DORETY, *Attorney for Defendant.*

(Endorsed:) State of Minnesota, in Supreme Court. Affidavit of disbursements and notice of taxation of costs.

Supreme Court, State of Minnesota.

MERCHANTS ELEVATOR COMPANY, RESPONDENT, *vs.* GREAT NORTHERN RY. CO. AND WALKER D. HINES, Director General of Railroads, appellant.	21910.

Pursuant to an order of court heretofore duly made and entered in this cause it is determined and adjudged municipal order of the court below, herein appealed from, to-wit, of the District Court within and for the county of Hennepin be and the same hereby is in all things affirmed.

And it is further determined and adjudged that respondent herein, do have and recover of appellant- herein the sum and amount of forty-eight and 20/100 dollars ($48.20) costs and disbursements in this cause in this court, and that execution may be issued for the enforcement thereof.

Dated and signed Dec. 15th, A. D. 1920.

By the court.

Attest.

[SEAL.]

HERMAN MUELLER,
Clerk.

STATEMENT FOR JUDGMENT.

Statutory costs, $25.00; printer, $23.20; clerk, $——; acknowledgments, $——; return, $——; postage and express, $——; filing mandate, $——; transcript, $——; appeal bond, $——; total, $48.20.

114 (Endorsed:) State of Minnesota, supreme court. Transcript of judgment.

STATE OF MINNESOTA, *ss:*

Supreme Court.

I, I. A. Caswell, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said supreme court at the capitol, in the city of St. Paul, —— ——, A. D. 191–.

—— ——,
Clerk.

STATE OF MINNESOTA:

Supreme Court.

I, Herman Mueller, clerk of the supreme court and custodian of the records thereof, do hereby certify that I have compared the foregoing paper writings, exclusive of endorsements, with the original record, stipulation, order, *stipulation*, *order*, syllabus and opinion, affidavit of costs and disbursements, notice of taxation of costs, proof of service, and copy of judgment with the originals remaining on file in my said office and that the same are full, true, and correct copies of said originals and the whole thereof.

In witness whereof, I have hereunto set my hand and affixed the seal of said supreme court, at the State capitol, in the city of St. Paul, on this 12th day of January, 1921.

[Seal of the supreme court, State of Minnesota.]

HERMAN MUELLER,
Clerk of Supreme Court.

(Endorsed:) Original. 21910. State of Minnesota. In supreme court. Merchants Elevator Company, plaintiff-respondent, vs. Great Northern Railway Company & United States Railroad Administration, Walker D. Hines, Director General of Railroads, defend-

ant'-appellant-. Stipulation & order. Supreme court. Filed Jun. 8, 1920. H. Mueller, clerk. Dille, Hoke, Krause & Faegre, 300 Security Bldg., Minneapolis.

115 In the Supreme Court of the United States.
October term, 1920.

GREAT NORTHERN RAILWAY COMPANY U. S. RAILROAD ADministration, Walker D. Hines, Director General of Railroads, petitioners,

vs.

MERCHANTS ELEVATOR COMPANY, respondent.

No. 686.

STIPULATION AS TO RETURN TO WRIT OF CERTIORARI.

It is hereby stipulated by counsel for the parties to the above entitled cause that the certified copy of the transcript of record now on file in the Supreme Court of the United States shall constitute the return of the clerk of the Supreme Court of Minnesota to the writ of certiorari granted therein.

JOHN F. FINERTY,
F. G. DORITY,
Counsel for Petitioners.
HAROLD G. SIMPSON,
Counsel for Respondent.

Dated February 28, 1921.

(Stamped:) Supreme court. Filed Mar. 4, 1921. H. Mueller, clerk.

116 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the honorable the judges of the Supreme Court of the State of Minnesota, greeting:

Being informed that there is now pending before you a suit in which Great Northern Railway Company and United States Railroad Administration, Walker D. Hines, Director General of Railroads, are appellants, and Merchants Elevator Company is respondent, No. 21910, which suit was removed into the said supreme court by virtue of an appeal from the municipal court, county of Hennepin, city of Minneapolis, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said supreme court and removed

117 into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as a foresaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the honorable Edward D. White, Chief Justice of the United States, the fifth day of February, in the year of our Lord one thousand nine hundred and twenty-one.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

118 (Endorsed:) File No. 28043. Supreme Court of the United States, No. 686, October term, 1920. Great Northern Railway Company et al. *vs.* Merchants Elevator Company. Writ of certiorari.

119 STATE OF MINNESOTA,
Supreme Court, ss:

To the honorable, to the judges of the Supreme Court of the United States:

In obedience to the command of the within writ I hereby transmit to the Supreme Court of the United States the foregoing stipulation together with the endorsement thereon and the original writ of certiorari in the action entitled: Great Northern Railroad Company, Walker D. Hines, Director General of Railroads, petitioner, vs. Merchants Elevator Company, respondent.

In witness whereof, I hereunto set my hand and affix the seal of said Supreme Court at the city of St. Paul, Minnesota, this 7th day of March, A.D., 1921.

[SEAL.] HERMAN MUELLER,
Clerk of Supreme Court.

(Stamped:) Office of the Clerk of the Supreme Court, U. S., received Mar. 14, 1921.

120 (Endorsed:) File No. 28,043 Supreme Court U. S., October Term, 1920. Term No. 686. Great Northern Railway Co. et al., petitioners, vs. Merchants Elevator Company. Writ of certiorari and return. Filed March 14, 1921.

○

No. 202.

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

GREAT NORTHERN RAILWAY COMPANY AND JOHN BARTON PAYNE, DIRECTOR GENERAL OF RAILROADS, PETITIONERS,

v.

MERCHANTS ELEVATOR COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF FOR PETITIONERS.

F. G. DORETY,
JOHN F. FINERTY,
Attorneys for Petitioners.

WASHINGTON, D. C., *April —, 1922.*

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1922

INDEX.

LIST OF CASES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

GREAT NORTHERN RAILWAY COMPANY AND John Barton Payne, Director General of Railroads, petitioners,
v.
MERCHANTS ELEVATOR COMPANY.
No. 202.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF FOR PETITIONERS.

STATEMENT OF CASE.

Certiorari was asked in this case to determine whether, consistently with the decision of this court in the case of *Texas & Pacific Railway Co.* v. *American Tie & Timber Co.*, 234 U. S. 138, a court might award damages for an alleged overcharge on an interstate shipment based on a court's construction of the disputed meaning of an interstate tariff, or whether resort must be had in the first instance to the Interstate Commerce Commission to determine the proper construction.

The Supreme Court of Minnesota had affirmed a judgment of the Municipal Court of the city of Minneapolis awarding the respondent $80 damages, with interest and costs, for an alleged overcharge on 16 interstate shipments of grain (Tr. 56), the sole issue being, as stated by the State Supreme Court, "as to the meaning of the language of the (tariff) exception" (Tr. 61). The State Supreme Court (Tr. 62) on the authority of its decision in the case of *Reliance Elevator Co.* v. *C. M. & St. P. Ry. Co.*, 139 Minn. 69, overruled the petitioners' contention that the court had no jurisdiction to construe the disputed meaning of the tariff and affirmed the construction placed upon the tariff by the trial court, which was the construction contended for by the respondent and was contrary to the construction contended for by the petitioners (Tr. 61).

The sole question on this writ being one of jurisdiction, the merits of the respective constructions of the tariff provision in issue are irrelevant. *Mitchell Coal Co.* v. *Pennsylvania Railroad*, 230 U. S. 247, p. 255. The question of the proper construction, therefore, will not be gone into in further detail than is necessary to show that the determination of this question was the basis of the court's judgment in favor of the respondent, and to demonstrate that the specific question involved was one peculiarly within the administrative functions of the Interstate Commerce Commission to determine, primarily because of the necessity of uniformity in the determination of such

questions, and secondarily because of the technical nature of the considerations involved.

As has already been noted, the opinion of the State Supreme Court (Tr. 61) states that the issue of the disputed tariff construction was the sole issue involved. Indeed, that issue was immediately raised by the pleadings, the complaint in the Municipal Court alleging (Tr. 2) that the petitioners had collected the charges in issue "contrary to their duly published tariffs" and the separate answers of petitioners denying this allegation (Tr. 3–4). On trial counsel for the respondent in his opening statement (Tr. 5) stated:

> It is our contention * * * that the $5 rule was suspended. It is the contention of the Great Northern that the charge of $5 was still in effect. And the only question, so far as I know, in this case is simply what the tariff provides.

Based on this statement and on the pleadings, counsel for petitioners immediately asked the trial court (Tr. 6) to dismiss the suit on the ground that counsel's statement, as well as the pleadings, showed that the question involved was a disputed question of construction of an interstate tariff filed with the Interstate Commerce Commission, and that such a question was one within the exclusive jurisdiction of the Interstate Commerce Commission under the decision of this court in the case of *Texas & Pacific Railway Co.* v. *American Tie & Timber Co.*, *supra*, and *Loomis* v. *Lehigh Valley Railroad*, 240 U. S. 43. The court,

however (Tr. 10), received testimony as to the construction of the tariff, subject to the objection. After testimony for the respondent by three alleged experts and at the close of respondent's case (Tr. 10–44), counsel for petitioners renewed the motion to dismiss, which the court thereupon denied (Tr. 44). After testimony by an expert for petitioners (Tr. 44–50), counsel for petitioners again renewed the motion to dismiss, which the court, after hearing arguments and receiving briefs, overruled, and thereupon entered judgment on the merits for the respondent (Tr. 56).

The dispute as to the proper construction of the tariffs arose in connection with Rule 10 of G. N. Ry. I. C. C. No. A–4524 (Plaintiff-respondent's Exhibit C; Tr. 20) which reads as follows:

> Rule 10. Diversion or reconsignment to points outside switching limits before placement: If a car is diverted, reconsigned or reforwarded on orders placed with local freight agent or other designated officer after arrival of car at original destination, but before placement for unloading, or if the original destination is served by a terminal yard, then after arrival at such terminal yard, a charge of $5.00 per car will be made if car is diverted, reconsigned or reforwarded to a point outside of switching limits of original destination.

This tariff originally contained an exception reading (Tr. 18):

> "These rules will not apply to—
>
> (*a*) Grain, hay, straw, or grass and field seeds held or stopped for official inspection.

This tariff, set out in full (Tr. 16–26), was published to become effective May 1, 1918.

On April 29, 1918, however, the Interstate Commerce Commission published a suspension order (Plaintiff-respondent's Exhibit D; Tr. 27). This order read, in part (Tr. 27–28):

> It is further ordered, that the operation of the rules and charges governing grain, seed (field), seed (grass), hay or straw—carloads—*held in cars on track for inspection and disposition orders incident thereto at billed destination or at point intermediate thereto,* appearing in said schedules contained in said tariffs, be suspended, and that the use of the said rules and charges, therein stated, be deferred upon interstate traffic until the 29th day of August, 1918, unless otherwise ordered by the Commission, and no change shall be made in such rules, charges, regulations and practices during the said period of suspension unless authorized by special permission of the Commission.

In compliance with this order, Supplement No. 1 to the foregoing tariff was published, effective May 1, 1918 (Plaintiff-respondent's Exhibit D; Tr. 26–28).

This supplement, after setting forth (Tr. 27–28) the Commission's suspension order, including the portion just quoted, provided as follows (Tr. 28):

> In compliance with the above order, rules, and charges, provided on lower portion of page 4 of G. N. Ry. I. C. C. No. A–4524, G. F. O. No. 1240–A, are under suspension and

will not be applied until August 29, 1918, unless otherwise ordered by the Interstate Commerce Commission.

During period of suspension, no charge will be made on grain, seed (field), seed (grass), hay or straw, carloads, *held in cars, on track for inspection and disposition orders incident thereto at billed destination or at point intermediate thereto.*

Substitute the following for paragraph (*a*) under caption "Exception" shown on page 2 of tariff:

(*a*) Grain, seed (field), seed (grass), hay or straw, carloads, *held in cars on track for inspection and disposition orders incident thereto at billed destination or at point intermediate thereto.*

This supplement was in effect at the time the shipments moved and all parties concede that Exception (*a*) as provided in the supplement must be substituted for the Exception (*a*) appearing in the original tariff. The respondent, moreover, concedes (Tr. 34) that, were there no exception or suspension order, the $5 charge provided by Rule 10 would apply. The respondent contends, however, that Exception (*a*) as published in Supplement No. 1 canceled the $5 charge so far as it applied to these shipments. On the other hand, the petitioners' position is, as shown by questions and argument of counsel (Tr. 35–37) and the testimony of petitioners' expert (Tr. 44–50), that Exception (*a*) of Supplement No. 1 did not cancel the $5 charge provided by Rule 10 of the original tariff for the following reasons:

The shipments in question were billed from points in Iowa and Nebraska to Willmar, Minn., and were there inspected by the State grain inspectors, and then ordered reconsigned to Anoka, Minn., a point beyond (Tr 33–34, 46). Exception (*a*), it will be observed, was applicable only where grain was "held in cars on track for inspection and *disposition* orders incident thereto *at billed destination* or at point intermediate thereto." This grain was not held for *disposition* orders *at billed destination* or at any point intermediate thereto, but was held for *reconsignment* to Anoka, a point *beyond* billed destination.

In other words, it appears that the issue before the court was the construction to be given the word "disposition" and the phrase "at billed destination" as used in the published tariff, and that on that construction depended the applicability of the $5 charge. As has been already noted, the question as to which construction was correct is not before this court in this proceeding. The sole question is whether consistently with the *American Tie Company case*, *supra*, the court had jurisdiction to construe the meaning of the interstate tariff, there being a *bona fide* question as to its proper construction.

It should be noted, moreover, that while the petitioners are quite willing to rest their case on the lack of jurisdiction in any court to construe the meaning of any interstate tariff where the meaning is disputed, the court in this instance, not only undertook to construe the disputed meaning of the tariff provision, but of necessity undertook to con-

strue the meaning of the Commission's suspension order, since the very language of the tariff in dispute (Tr. 28) was copied verbatim from that of the suspension order (Tr. 28). In other words, the action of the court in this instance might well result in a collateral attack on the Commission's order itself, unless the Commission were first resorted to to determine the meaning of that order.

This brings the petitioners to the necessity of anticipating that the respondent may, as the respondent did before the Supreme Court of Minnesota, go outside the record and attempt to intrude into the case before this court certain alleged correspondence with the Interstate Commerce Commission which respondent contends contains a construction of the tariff provision in question. This correspondence consists of what purports to be a letter from the secretary of the Interstate Commerce Commission to the traffic manager of the Great Northern Railway Company, and a letter from Commissioner Eastman of the Interstate Commerce Commission to Mr. Chambers, Director of Traffic of the United States Railroad Administration.

It will suffice to say here that neither letter was offered in evidence nor is of record in this case; that the first letter was dated after the judgment of the trial court was entered, and that the second letter was written after the final decision of the case in which the suspension order of the Commission already referred to was issued, and that this letter referred, not to that suspension order, but to a proposed new rule carrying

t the Commission's final decision. Finally, that en assuming, contrary to the fact, that this corres-ndence contained a construction by the Commission the tariff provision in question, neither the plead-gs in this case, the judgment of the trial court, nor ie judgment of the Supreme Court, purport in any ay to be based upon any such construction. Indeed is expressly to be noted that the Supreme Court in s opinion did not even refer to the alleged construc-ion by the Interstate Commerce Commission, but ased its judgment solely upon its own construction f the tariff (Tr. 61).

Nor should it be overlooked that it is extremely loubtful under the *Clark case*, 238 U. S. 456, p. 470, whether a *State* court could in any event have juris-liction of an action based on a disputed question of tariff construction, without a precedent award of damages by the Commission, as well as a precedent determination of the proper construction.

With this statement of the essential facts, the petitioners will now proceed to a consideration of the decision of the Supreme Court of Minnesota herein, with a view to determining whether that decision is consistent with the decision of this court in the *American Tie case, supra*, and if not, whether it is warranted by any other decisions of this court, so as to require this court either to repudiate its decision in the *American Tie case*, or so to limit that decision as to make it inapplicable here.

BRIEF.

I.

The Supreme Court of Minnesota in holding that a disputed question of construction of an interstate tariff is within the jurisdiction of a court and does not require resort in the first instance to the Interstate Commerce Commission, not only directly contravenes the decision of this court in the case of Texas & Pacific Railway Company v. American Tie & Timber Company, 234 U. S. 138, but in addition is in contravention of, or inconsistent with, the following decisions of this court:

T. & P. Ry. v. *Abilene Cotton Oil Co.*, 204 U. S. 426.

B. & O. R. R. v. *Pitcairn Coal Co.*, 215 U. S. 481.

Interstate Commerce Commission v. *C., R. I. & P. Ry. Co.*, 218, U. S. 88.

Robinson v. *B. & O. R. R.*, 222 U. S. 506.

Interstate Commerce Commission v. *Union Pacific Railroad Co.*, 222 U. S. 541.

Interstate Commerce Commission v. *Louisville & Nashville Railroad Co.*, 227 U. S. 88.

United States v. *Pacific & Arctic Co.*, 228 U. S. 87.

Mitchell Coal Co. v. *Pennsylvania Railroad Co.*, 230 U. S. 247.

Morrisdale Coal Co. v. *Pennsylvania Railroad Co.*, 230 U. S. 304.

Boston & Maine Railroad Co. v. *Hooker*, 233 U. S. 97.

Phillips v. *Grand Trunk Ry. Co.*, 236 U. S. 662.

Pennsylvania Railroad Co. v. *Clark Coal Co.*, 238 U. S. 456.

Loomis v. *Lehigh Valley Railroad Co.*, 240 U. S. 43.

Louisville & Nashville Railroad Co. v. *Ohio Valley Tie Co.*, 242 U. S. 288.

Northern Pacific Railway Co. v. *Solum*, 247 U. S. 477.

Director General v. *Viscose Co.*, 254 U. S. 498.

Minnesota Rate Case, 230 U. S. 352.

II.

Nor can the decision of the Supreme Court of Minnesota herein be justified under the decisions of this court in which, under the peculiar circumstances of the respective cases, this court has sustained the jurisdiction of a court over questions arising under the interstate commerce act of a character which this court has generally recognized to be primarily within the jurisdiction of the Interstate Commerce Commission:

Wight v. *United States*, 167 U. S. 512.

Southern Railway Co. v. *Tift*, 206 U. S. 428.

Interstate Commerce Commission v. *Illinois Central Railroad Co.*, 215 U. S. 452.

Louisville & Nashville Railroad Co. v. *Cook Brewing Co.*, 223 U. S. 70.

Galveston, Houston & San Antonio Ry. Co. v. *Wallace*, 223 U. S. 481.

Pennsylvania Railroad Co. v. *International Coal Co.*, 230 U. S. 184.

Florida East Coast Line v. *United States*, 234 U. S. 167.

Pennsylvania Railroad Co. v. *Puritan Coal Co.*, 237 U. S. 121.

Eastern Railway Co. v. *Littlefield*, 237 U. S. 140.

Illinois Central Railroad Co. v. *Mulberry Coal Co.*, 238 U. S. 275.

Philadelphia & Reading Railway Co. v. *U. S. and Allentown Portland Cement Co.*, 240 U. S. 334.

Pennsylvania Railroad Co. v. *Jacoby*, 242 U. S. 89.

Pennsylvania Railroad Co. v. *Sonman Coal Co.*, 242 U. S. 120.

Swift & Company v. *Hocking Valley Railway Co.*, 243 U. S. 281.

Pennsylvania Railroad Co. v. *Kitanning Co.*, 253 U. S. 319.

St. Louis, Iron Mountain & Southern Railway Co. v. *Hasty*, 255 U. S. 252 (State rates).

Central R. R. of New Jersey v. *Untied States*, — U. S. —, decided 12/5/21.

Schaff, Receiver, v. *Famechon*, — U. S. —, decided 2/27/22.

III.

The misconstruction or ignoring by State and subordinate Federal courts of the decision of this court in the American Tie case, supra, would seem to warrant this court in removing any possible doubt that its decision in that case requires resort in the first instance to the Interstate Commerce Commission to determine any disputed question of construction of an interstate tariff, that this requirement has in no way been modified, and that neither a State nor a Federal court has jurisdiction of such a question.

Reliance Elevator Co. v. *C., M. & St. P. Ry. Co.*, 165 N. W. (Minn.) 867.

[1] *Gustafson et al.* v. *Michigan Central Railroad Co.*, 129 N. E. 516.

[1] Does not cite *American Tie & Timber Co. case.*

Wolverine Brass Works v. *Southern Pacific Co.*, 153 N. W. 778.

[1] *National Elevator Co.* v. *C., M. & St. P. Ry. Co.*, 246 Fed. (8 Cir.) 588.

Francisconi v. *B. & O. R. R. Co.*, 274 Fed. (2 Cir.) 687.

[1] *Empire Refineries (Inc.)* v. *Guaranty Trust Co. of New York*, 271 Fed. 668.

IV.

The only two decisions of State or subordinate Federal Courts which have followed and applied the decision of this court in the American Tie & Timber case, supra, are:

Cheney v. *Boston & Maine Railroad Co.*, 116 N. E. (Mass.) 411;

Poor v. *Western Union Telegraph Co.*, 196 S. W. (Mo.) 28.

V.

The following decisions of State and subordinate Federal Courts with reference to the jurisdiction of the Interstate Commerce Commission and of the courts, respectively, over questions arising under the Interstate Commerce Act, were either rendered before the decision of this court in the American Tie case, supra,[2] or are distinguishable from that case upon the same general grounds under which the decisions of this court cited under point II hereof may be distinguished:

Hite v. *Central Railroad of New Jersey*, 171 Fed. 370 (1909);

National Pole Co. v. *C. & N. W. Ry. Co.*, 211 Fed. (7 Cir.) 65; (1/6/14).

[1] Does not cite *American Tie & Timber Co. case.*

[2] Dates given of decisions rendered prior to decision of this court in *American Tie & Timber Co. case.*

Gimbel Bros. v. *Barrett*, 215 Fed. (Dist. Pa.) 1004;

C. B. & Q. Ry. Co. v. *Feintuch*, 191 Fed. (9 Cir.) 482 (1910);

Kansas City Southern Ry. Co. v. *Tonn*, 143 S. W. (Ark.) 577 (1912);

Hardaway v. *Southern Ry. Co.*, 73 S. E. (S. C.) 1020 (1912);

Western & A. R. Co. v. *White Provision Co.*, 82 S. E. (Ga.) 644;

Southern Pacific Co. v. *Frye & Bruhn*, 143 Pac. (Wash.) 163;

St. L., S. F. & T. Ry. Co. v. *Roff Oil Co.*, 128 S. W. (Tex.) 1194 (1910);

Laing-Harris Coal & G. Co. v. *St. L. & S. F. Ry. Co.*, 15 I. C. C. 37.

ARGUMENT.

I.

The Supreme Court of Minnesota, in holding that a disputed question of construction of an interstate tariff is within the jurisdiction of a court and does not require an award by the Interstate Commerce Commission in the first instance, not only directly contravenes the decision of this court in the case of Texas & Pacific Railway Company v. American Tie & Timber Company, 234 U. S. 138, but in addition is in contravention of the cases cited under Point I of the brief herein. Furthermore, such a holding can not be justified under the decisions of this court cited under Point II of the brief.

In the case of *Texas & Pacific Railway Company* v. *American Tie & Timber Company* (234 U. S. 138) this court said:

It is not disputable that the pivotal question in the case was whether oak railway crossties were included in the filed tariff fixing a through lumber rate of 24 cents per hundredweight, and so far as the solution of that inquiry depended upon the views of men engaged in the lumber and railroad business, as developed in the testimony, it is equally indisputable that there was an irreconcilable conflict. And this conflict at once leads to a consideration of the principle which dominates the controversy and upon which its decision therefore depends.

There is no room for controversy that the law required a tariff, and therefore, if there was no tariff on crossties the making and filing of such tariff conformably to the statute was essential. *And it is equally clear that the controversy as to whether the lumber tariff included crossties was one primarily to be determined by the Commission in the exercise of its power concerning tariffs and the authority to regulate conferred upon it by the statute.* Indeed, we think it is indisputable that that subject is directly controlled by the authorities which establish that for the preservation of the uniformity which it was the purpose of the act to regulate commerce to secure, *the courts may not as an original question exert authority over subjects which primarily come within the jurisdiction of the Commission. Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Baltimore & Ohio R. R. Co.* v. *United States ex rel. Pitcairn Coal Co.*, 215 U. S. 481; *Robinson* v. *Baltimore & Ohio R. R. Co.*, 222 U. S. 506; *Mitchell Coal Co.* v. *Pennsyl-*

vania R. R. Co., 230 U. S. 247; *Morrisdale Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 304. No question is made as to the controlling effect of the doctrine as a general rule, but it is urged that it is not applicable to this case for the following reasons:

(*a*) The foundation upon which the doctrine rests, it is insisted, is the necessity of a uniform enforcement of the Interstate Commerce Act and the danger of diversity and conflict arising if questions concerning the existence of tariffs or their reasonableness, of discriminations and preferences were left to be originally determined by courts of general jurisdiction, thus giving rise to the possibility of one rule in one jurisdiction and another in another. But the argument proceeds to insist that upon the principle that where the reason for the application of a law ceases to exist the law itself ceases to apply, the settled construction of the act to regulate commerce, announced and enforced in the Abilene and other cases, has here no application because it is so plain that oak crossties were included in the lumber rate as fixed in the tariff of the railway company that there is no reason for proceeding primarily before the Commission, as there is no possibility of difference on the subject if left to the consideration of the courts. We need not pause to point out the palpable error of law which the proposition involves, since on the face of the record it is apparent that the assumption of fact upon which it rests is absolutely without foundation. We say this because nothing could more clearly demon-

> strate such result than does the conflict and confusion in the testimony concerning whether crossties were included in the filed lumber tariff. * * *

Just how this court could more clearly and unmistakably proclaim the jurisdiction of the Interstate Commerce Commission and the nonjurisdiction of the courts over a disputed question of tariff construction, it would be difficult to imagine. As the portion of the court's opinion which has been italicized shows, the sole question in the case was

> whether oak railway crossties were included in the filed tariff fixing a through lumber rate of 24 cents per hundredweight,

and the court itself states:

> And it is equally clear that the controversy as to whether the lumber tariff included crossties was one primarily to be determined by the Commission in the exercise of its power concerning tariffs and the authority to regulate conferred upon it by the statute * * * the courts may not as an original question exert authority over subjects which primarily come within the jurisdiction of the Commission.

What, then, are the reasons which the Supreme Court of Minnesota has given for failing to apply in this case the law so established?

As has been noted, the decision of the Supreme Court of Minnesota herein, 180 N. W. 105 (Tr. 60), rests its affirmance of the jurisdiction of the trial

court to decide a disputed question of construction of an interstate tariff on the previous decision of that court in the case of *Reliance Elevator Company* v. *C. M. & St. P. Ry. Co.*, 139 Minn. 69 (165 N. W. 867). In the *Reliance case*, which was a suit for overcharges brought in a State court, the disputed question of construction was whether Strasburg, N. Dak., was an intermediate station between Linton, N. Dak., and Minneapolis, Minn., within the meaning of the interstate tariff reading as follows:

> Between stations on the C. M. & St. P. Ry. rates to and from intermediate stations will be the same as shown to or from the next more distant station to or from which rates are named.

The trial court had dismissed the case for lack of jurisdiction. The State Supreme Court, while holding that the trial court should have assumed jurisdiction, affirmed the dismissal of the suit on the ground that under the construction which the State Supreme Court itself put upon the tariff there was no overcharge. It is to be noted that this situation, as the State Supreme Court itself mentions in the last paragraph of its opinion, effectively prevented any review of the decision of the State Supreme Court.

That court, in discussing the question of jurisdiction, said:

> "Defendant contended in the trial court and also contends in this court that the interstate commerce law gave the Interstate Commerce

Commission exclusive jurisdiction over the questions in controversy; and that the courts, or at least the State courts, have no jurisdiction of the subject matter of the action.

(2, 3) It is thoroughly settled that the rates for interstate shipments named in the tariffs published and filed as required by the interstate commerce law, of the legal rates for such shipments, and can not be deviated from by either shipper or carrier until changed in the manner prescribed in that law; *and that a shipper who seeks to attack such published rates upon the ground that they are unreasonable or discriminatory or infringe the law in some other respect, must make his complaint to the Interstate Commerce Commission before he can resort to the courts*, for the reason that original jurisdiction over such questions has been withdrawn from the courts and vested in the Commerce Commission. *Texas & Pac. Ry. Co.* v. *Abilene Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075; *Robinson* v. *B. & O. Ry. Co.*, 222 U. S. 506, 32 Sup. Ct. 114, 56 L. Ed. 288; *Mitchell Coal & Coke Co.* v. *Pennsylvania Ry. Co.*, 230 U. S. 247, 33 Sup. Ct. 916, 57 L. Ed. 1472; *Texas & Pac. Ry. Co.* v. *American Tie & Timber Co.*, 234 U. S. 138, 34 Sup. Ct. 885, 58 L. Ed. 1255; *Loomis* v. *Lehigh Valley Ry. Co.*, 240 U. S. 43, 36 Sup. Ct. 228, 60 L. Ed. 517; *B. & O. Ry. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481, 30 Sup. Ct. 164, 54 L. Ed. 292; *Morrisdale Coal Co.* v. *Pennsylvania Ry. Co.*, 230 U. S. 304, 33 Sup. Ct. 938, 57 L. Ed. 1494.

(4) *But where the validity of the published rate is conceded and the shipper merely seeks to recover an excess which he alleges that the carrier has exacted and collected over and above such published rate, section 22 of the Interstate Commerce law (U. S. Comp. St. 1916, Sec. 8595) saves to him the right to bring his action therefor in the State Court. Pennsylvania Ry. Co.* v. *Sonman S. C. Co.*, 242 U. S. 120, 37 Sup. Ct. 46, 61 L. Ed. 188; *Pennsylvania Ry. Co.* v. *Puritan Coal Co.*, 237 U. S. 121, 35 Sup. Ct. 484, 59 L. Ed. 867; *Eastern Ry. Co.* v. *Littlefield*, 237 U. S. 140, 35 Sup. Ct. 489, 59 L. Ed. 878; *Illinois C. Ry. Co.* v. *Mulberry Hill Coal Co.* 238 U. S. 275, 35 Sup. Ct. 760, 59 L. Ed. 1306; *Mitchell C. & C. Co.* v. *Pennsylvania Ry. Co.* 230 U. S. 247, 33 Sup. Ct. 916; 57 L. Ed. 1472; *Gimbel Bros.* v. *Barrett* (D. C.) 215 Fed. 1004; *Hite* v. *Central Ry. Co.* 171 Fed. 370, 96 C. C. A. 326; *Wolverine Brass Works* v. *Southern Pac. Co.*, 187 Mich. 393, 153 N. W. 778; *Western & Atlantic Ry.* v. *White Provision Co.* 142 Ga. 246, 82 S. E. 644; *Kansas City S. Ry.* v. *Tonn*, 102 Ark. 20, 143 S. W. 577.

(5) *In the present case the pleadings raised no question as to the validity of the rate fixed by the tariff, and the only issue presented for trial was whether defendant had collected an amount in excess of the prescribed rate. In National Elevator Co. against this same defendant, supra, the court held that the Federal court had jurisdiction to determine that question, and we are of opinion that the State court also has jurisdiction to determine it.*

The petitioners are frank to say that it is incomprehensible to them how the Supreme Court of Minnesota could have reached the conclusion that the considerations which it mentions, and which have been italicized, take either the *Reliance case*, or this case, out of the scope of the decision of this court in the *American Tie case*, which it will be noted the State Supreme Court specifically cites.

Indeed, the Supreme Court of Minnesota leaves entirely to inference the grounds upon which it assumes to distinguish the *Reliance case* from the *American Tie case*. It will be noted that the Supreme Court, without singling out the *American Tie case* in any way, merely cites that case among others in support of the proposition—

> that a shipper who seeks to attack such published rates *upon the ground that they are unreasonable or discriminatory or infringe the law in some other respect*, must make his complaint to the Interstate Commerce Commission before he can resort to the courts.

While the *American Tie case* is certainly authority for the proposition stated, it is by no means limited to a case where the rates are attacked upon the ground "that they are *unreasonable* or *discriminatory* or *infringe the law* in some other respect," as perhaps is true of the other cases cited by the State Supreme Court, with the exception of the *Loomis case*.

In the *American Tie case*, as has been seen, this court did not consider any question of unreasonable-

ness or discrimination or infringement of the law in any other respect. As this court itself said (p. 146):

> It is not disputable that the pivotal question in the case was whether oak railway crossties were included in the filed tariff fixing a through lumber rate of 24 cents per hundredweight.

Moreover, while it is true that in analyzing the complaint in that case, this court said (pp. 142, 143):

> The petition charged, however, that the joint through lumber rate above referred to and the rate of 24 cents thereby established included oak ties, and that the railway's refusal to provide cars and to carry the ties at its published rate was an unjust and unreasonable discrimination against the Tie Company, against the several places on the railway company's line where the ties had been accumulated, and against the ties as an article of commerce, * * *. It was alleged that the refusal to transport the ties had resulted in unreasonable prejudice and disadvantage to the Tie Company and to the traffic in ties, and in benefit to the railway company as a purchaser and consumer of crossties, all of which constituted a violation of the act to regulate commerce.

this court dismissed the case without further reference to the irrelevant allegation of discrimination, because this court concluded (p. 146):

> That the controversy as to whether the lumber tariff included crossties was one primarily to be determined by the Commission in the exercise of its power concerning tariffs and the authority to regulate conferred upon it by

> the statute. * * * The courts may not as an original question exert authority over subjects which primarily come within the jurisdiction of the Commission.

The petitioners are loath to conclude, therefore, that the Supreme Court of Minnesota believed this incidental and irrelevant allegation of discrimination, which this court did not even consider, to be, nevertheless, the controlling principle of the decision of this court in the *American Tie case*. As has been said, that court leaves entirely to inference just what consideration it gave that case. The petitioners, therefore, are forced to the conclusion that, unless the Supreme Court of Minnesota entirely misconstrued that case, that court must have considered the doctrine of that case to have been repudiated or limited by the cases which that court cites under Point (4) of its opinion.

The petitioners feel justified, therefore, in assuming that it has been clearly shown that the *American Tie case* definitely and without qualification requires resort in the first instance to the Interstate Commerce Commission to determine a disputed question of construction of an interstate tariff, and prohibits a court from assuming jurisdiction of such a question; and that it has been further shown that neither this case nor the *Reliance Elevator case* is distinguishable from the *American Tie case*.

Two questions remain in this connection:

(*a*) Do the decisions of this court cited under Point I of the brief justify and support the doctrine of the *American Tie case*?

(*b*) Do the decisions of this court cited under Point II of the brief in any way limit or qualify the doctrine of the *American Tie case*, or are they distinguishable from that case, and, therefore, equally distinguishable from the case at bar and from the *Reliance Elevator case*?

(a) The decisions of this court cited under Point I of the brief fully justify and support the doctrine of the American Tie case.

The *American Tie case*, it has been seen, requires resort to the Interstate Commerce Commission in the first instance to determine a disputed question of construction of an interstate tariff, and prohibits a court from assuming jurisdiction of such a question. In that portion of the court's opinion which has already been quoted, the court gives both the reason for this holding and the authorities in support of it. This court says (p. 146):

> "Indeed we think it indisputable that that subject is directly controlled by the authorities, which establish that *for the preservation of uniformity* which it was the purpose of the act to regulate commerce to secure, the courts may not, as an original question, exert authority over subjects which primarily come within the jurisdiction of the Interstate Commerce Commission. *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Balt. & Ohio R. Co.* v. *United States ex rel. Pitcairn Coal Co.*, 215 U. S. 481; *Robinson* v. *Baltimore & O. R. Co.*, 222 U. S. 506; *Mitchell Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 247; *Morrisdale Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 304."

It will be noted that the reason which this court gives for the primary jurisdiction of the Interstate Commerce Commission over a disputed question of tariff construction is—

> *the preservation of the uniformity* which it was the purpose of the act to regulate commerce to secure.

The petitioners most respectfully submit that this essential of uniformity not only has been, but should continue to be, the controlling consideration by which this court must determine the necessity of primary recourse to the Commission. The petitioners, moreover, submit that whatever apparent conflict there may be in the decisions of this court on the question, it is, or should be, soluble by the application of this test. This essential of uniformity was the principle underlying and justifying the decision of this court in the first case in which the question arose, the *Abilene case* (204 U. S. 426), and it has been the principle and the test by which this court has solved the numerous variations of this jurisdictional question as they have arisen.

In the *Abilene case*, the Court of Civil Appeals of Texas had upheld the jurisdiction of a State court over a suit to recover alleged unreasonable rates charged on an interstate shipment of cotton seed. It was urged that this right of action was preserved in the courts under sections 9 and 22 of the Interstate Commerce Act. This court, referring to those sec-

tions of the act, at pages 438 and 439 of its opinion, states:

> By the ninth section of the act it was provided as follows:
>
> "That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission, as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. * * *"
>
> And by section 22, which we shall hereafter fully consider, existing appropriate common law and statutory remedies were saved.

The pertinent provisions of section 22 as quoted by this court (p. 446 of its opinion) read:

> * * * Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.

This court, after noting that it was beyond doubt that an action could be maintained at common law against a carrier to recover unreasonable charges, proceeds as follows (p. 436, 437):

> As the right to recover, which the court below sustained, was clearly within the prin-

ciples just stated, and as it is conceded that the act to regulate commerce did not in so many words abrogate such right, it follows that the contention that the right was taken away by the act to regulate commerce rests upon the proposition that such result was accomplished by implication. In testing the correctness of this proposition we concede that we must be guided by the principle that repeals by implication are not favored, and indeed that a statute will not be construed as taking away a common-law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it be found that the preexisting right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory.

Both parties concede that the question for decision has not been directly passed upon by this court, and that its determination is only persuasively influenced by adjudications of other courts. They both hence mainly rely upon the text of the act to regulate commerce as it existed at the time the shipments in question were made. The case, therefore, must rest upon an interpretation of the text of the act and is measurably one of first impression.

This court then goes on to discuss the purposes which the Interstate Commerce Act was intended to serve, the principal one, as shown by this court, being the prevention of discrimination by the iron-

clad requirement that the published rates be adhered to. After referring to sections 9 and 22 of the act, as already noted, this court says (pp. 439, 440):

> That the act to regulate commerce was intended to afford an effective means for redressing the wrongs resulting from unjust discrimination and undue preference is undoubted. Indeed, it is not open to controversy that to provide for these subjects was among the principal purposes of the act. * * * *And it is apparent that the means by which these great purposes were to be accomplished was the placing upon all carriers the positive duty to establish schedules of reasonable rates which should have a uniform application to all* and which should not be departed from so long as the established schedule remained unaltered in the manner provided by law. * * *.
>
> When the general scope of the act is enlightened by the considerations just stated, it becomes manifest that there is not only a relation, but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discriminations. *This follows, because unless the requirement of a uniform standard of rates be complied with* it would result that violations of the statute as to preferences and discrimination would inevitably follow.

This court then proceeds to demonstrate the obvious impossibility of uniformity if the various courts were allowed to indulge their respective ideas as to the reasonableness of a particular rate, and the equal lack of uniformity which would result if both the courts and the Commission had coordinate jurisdiction, and says (p. 442):

> In other words, we think that it inevitably follows from the context of the act that the independent right of an individual originally to maintain actions in courts to obtain pecuniary redress for violations of the act conferred by the ninth section must be confined to redress of such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the Commission, and, therefore, does not imply the power in a court to primarily hear complaints concerning wrongs of the character of the one here complained of.

Referring to section 22 of the act, the court then says (p. 446):

> But it is insisted that, however cogent may be the views previously stated, they should not control, because of the following provision contained in section 22 of the act to regulate commerce, viz: "* * * Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." This clause, however, can not in reason be construed as

> continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act can not be held to destroy itself.

Further quotation from the *Abilene case* would unduly extend this argument and would only afford cumulative evidence of what is already abundantly clear; that is, that the necessity of uniformity was the compelling consideration which actuated this court in holding that the broad provisions of sections 9 and 22 of the act to regulate commerce, retaining to the courts their jurisdiction and to the shippers their common law remedies, are by necessary implication limited so as to require resort in the first instance to the Commission where uniformity is essential.

The necessity of uniformity, moreover, is the controlling principle of the four other decisions, in addition to the *Abilene case*, which this court cites in the *American Tie case* in support of its application of that test to the primary jurisdiction of the Commission. Again, to avoid undue extension of the argument, petitioners will content themselves with merely referring the court to the pages in the respective reports of those cases which demonstrate that those decisions were controlled by this test of uniformity.

In *Baltimore & Ohio R. R. Co.* v. *Pitcairn Coal Co.* (215 U. S. 481) this court applied this test in denying the jurisdiction of a court under section 23 of the Act,

to mandamus a carrier so as to compel it to furnish cars on the ground of discrimination in the rules and practices of the carrier in this respect. This court held that the broad provisions of section 23 of the act, conferring upon the Federal courts the right to mandamus carriers to compel the furnishing of cars, were, for the same considerations of uniformity which had controlled its decision in the *Abilene case* with reference to the equally broad provisions of sections 9 and 22, by necessary implication again limited so as to require recourse to the Commission in the first instance. (See pp. 494–495 and p. 498.)

In *Robinson* v. *Baltimore & Ohio R. R. Co.* (222 U. S. 506) this court again applied the test of uniformity in holding that a court had no jurisdiction of an action for alleged discrimination in the publication of different rates on coal depending on whether the coal was loaded into the car from wagons or from the tipple. The court, further quoting the *Abilene case*, held (p. 511) that there was no difference in this respect between an action for damages based on alleged discrimination in rates, and one based on the alleged unreasonableness of rates (see also last paragraph, p. 509 and top of p. 510).

In *Mitchell Coal & Coke Co.* v. *Pennsylvania R. R. Co.* (230 U. S. 247) the court applied this test of uniformity to an action for alleged discrimination by rebates from the published rate, alleged to have been made to a competitor in the guise of section 15 allowances. (See pp. 255–257.)

Moreover, this court in its decision in the *Mitchell case* disposed of the contention that whatever necessity there might be for uniformity in the prescription of rates and practices for the future, no such necessity existed with reference to the award of damages for the past, and therefore that there was no reason for primary recourse to the Commission in an action merely for damages. (See pp. 258–260.) In this connection, it should be noted that while this court in the *Abilene case* was considering a suit for damages for the past exaction of alleged unreasonable rates, it did not in its opinion specifically discuss the question as to whether any difference existed between such a case and one involving the prescription of rates for the future.

Finally, in *Morrisdale Coal Co.* v. *Pennsylvania R. R. Co.* (230 U. S. 304) the last case cited by this court in support of its doctrine in the *American Tie case*, this court, without specific reference to the necessity for uniformity, but citing the *Abilene*, *Pitcairn*, and *Robinson cases*, denied the jurisdiction of a court to award damages for alleged unfair distribution of coal cars to it and an undue allotment to a competitor. In this connection, notice should perhaps be taken of the contention of the plaintiff that the suit was actually one for damages for violation of the carrier's own rule, and that therefore there was no necessity of primary recourse to the Commission. It will suffice to say, however, that this court finds it unnecessary to decide, had such been actually the

case, whether primary resort to the Commission would have been necessary, since this court states (p. 314):

> On the contrary, it was admitted at the hearing that there had been no discrimination against the plaintiff in the application of the rule, the complaint being that the basis of allotment was unreasonable.

We refer to this question here, however, because it will subsequently be necessary to consider whether an action may be maintained in court based upon a departure from the carrier's own rules if there is no attack upon the rules themselves.

This examination of the authorities cited by this court in the *American Tie case* clearly supports the controlling effect given by this court in that case to the necessity of uniformity in tariff construction as the test for requiring primary recourse to the Commission. As has already been noted, it is the petitioners' contention that the essential test of the primary jurisdiction of the Commission is whether the question in dispute requires uniformity of decision in order to insure that uniformity in rates and services which has been recognized by this court itself, to be the essential result which the interstate commerce act was intended to secure. Moreover, as has been noted, the petitioners believe that any apparent confusion in the decisions of this court on the question of the jurisdiction, respectively, of the courts and of the Commission has arisen either because this requisite of uniformity as a test of

jurisdiction has been departed from or, if in fact applied, has at times been overlaid by other and accidental considerations.

Your petitioners most respectfully submit that this has been true even in connection with the remaining decisions of this court cited under Point I of the brief as in general supporting the doctrine of the *American Tie case*. Practically, if not without exception, those decisions in rejecting the jurisdiction of the courts over the particular questions involved cite the *Abilene*, the *Pitcairn*, the *Robinson*, the *Mitchell*, and the *Morrisdale cases*, and therefore, inferentially at least, incorporate the foundation upon which each of those decisions expressly rests, the necessity of uniformity as the test of the primary jurisdiction of the Commission. It must be admitted, however, that in certain of them this test is not expressly applied, and, indeed, that other and less valid grounds are made the specific basis of the court's decision. A critical analysis, however, of the respective cases will disclose that all of these decisions are, or can be justified under this test, and that by this test alone can they be harmonized.

Indeed, in this respect it is necessary to return to a further consideration of the *Mitchell Coal case* itself. As has been seen, this court, on pages 255 to 257, expressly based its decision that the Commission had primary jurisdiction of an action for alleged discrimination through rebates from the published rate in the guise of section 15 allowances, upon the necessity of uniformity of decision as to the reasonableness of

the allowances. On page 257, however, the court says:

> The claim that this conclusion nullifies section 9 is concretely answered by the fact that the court has just decided to the contrary in *Pennsylvania Railroad* v. *International Coal Co.* There the carrier insisted that a suit for damages occasioned by rebating could not be maintained without preliminary action by the Commission. This contention was overruled and it was held that for doing an act prohibited by the statute the injured party might sue the carrier without previous action by the Commission, because the courts could apply the law prohibiting departure from the tariff to the facts of the case. But where a suit is based upon unreasonable charges or unreasonable practices there is no law fixing what is reasonable and therefore prohibitive. In such cases the whole scope of the statute shows that it was intended that the Commission and not the courts should pass upon that administrative question.

The petitioners most respectfully submit that this, however, is not the fundamental distinction between the *International Coal case* (230 U. S. 184) and the *Mitchell case*. The real distinction between these cases is that in the *International Coal case* the carrier did not deny the departure from the published tariff, while in the *Mitchell case*, on the contrary, the carrier denied that there was any departure, and alleged that the allowance was only reasonable compensation for the performance by the

shipper of a service which the carrier was bound to perform under its published tariffs. In other words, in the *International Coal case*, it being admitted that the published tariff was departed from, there was no necessity of primary recourse to the Commission, because uniformity was insured by adherence to the published tariff, the meaning of which was not in issue. Further consideration will be given to the *International Coal case* in connection with Point II of this brief. It will suffice to say here that there was nothing in that decision which would indicate that this court would still have sustained the jurisdiction of the trial court had there been any denial of the departure from the published tariff.

On the other hand, in the *Mitchell case*, the very first question with which the court was confronted was, Was the service for which the allowance was made included in the carrier's obligations under the published tariff? and on this question, and not on the question of the reasonableness of the allowance, did the Commission's primary jurisdiction fundamentally attach. The question of the reasonableness of the allowance could only arise in the event the services for which the allowance was made were services which the carrier was obligated to perform under the tariff. If they were not, any allowance, however reasonable otherwise, would have constituted a departure from the tariff and a rebate.

Indeed, this court itself recognized that no allowance whatever could be made unless the carrier were

bound to perform the service. The court says (pp. 262–264):

> But although the statute then in force was not construed to require the publication of allowances, their payment was lawful only when supported by a consideration. To pay shippers for doing their own work would have been a mere gratuity, and if the carrier was not bound to haul from the mine it had no more right to pay these companies for bringing their coal over the spur track to the junction than it would have had to pay a merchant for hauling his goods in a wagon to the railroad depot.

Moreover, this court specifically noted that the question of the limits within which the rates applied was a question in connection with which the Commission alone could act, but failed to recognize the controlling significance of this question, rather than that of the reasonableness of the allowance. The court says (pp. 263–264):

> In case any question arose as to the reasonableness of the practice, *the limits within which the station rate should apply* or the reasonableness of the allowance paid those shippers who supply motive power, the Commission alone could act.

The court nevertheless, therefore, goes on to ignore that the controlling question was whether the service was included in the tariffs, and on page 266, again referring to the *International Coal case* in connection with certain complainants in the *Mitchell case* itself, who had no engines and performed no service but

nevertheless received allowances, undertakes to distinguish the *International Coal case* and these latter complainants from the *Mitchell case* generally, on the ground that the departure from the tariffs being prohibited by law it was not necessary to have any preliminary decision to that effect by the Commission. In other words, the court again fails to recognize that in the *Mitchell Coal case*, had there been a departure from the tariff, it was equally prohibited by law, but that the primary question which the Commission and not the court had to decide was whether there had been such a departure, and that it is this which distinguishes the *Mitchell case* generally from the *International Coal case* and from the other complainants in the *Mitchell case* itself, where the departure was admitted.

The *Mitchell Coal case*, therefore, correctly understood, is not only consistent with the doctrine of the *American Tie case*, but in reality is in principle, and in the controlling question decided, upon all fours with the *American Tie case*. It can not be too clearly understood that the primary jurisdiction of the Commission in the *Mitchell Coal case* rested essentially on the necessity of uniformity in the construction of a tariff, and that while this court somewhat obscured this fact by giving what would seem to be undue prominence to other considerations, it did in fact recognize this question as being one for the Commission to decide.

It is to be regretted, in this connection, that considerations of space forbid more detailed analysis of

Justice Pitney's dissent. There are, however, one or two comments which it may be helpful to make. Not the least difference between Justice Pitney and the majority of the court would seem to have been based on the majority's conclusion that under the act as it then stood it was not necessary to the legality of an allowance that it be published. Fundamentally, however, Justice Pitney would seem to have dissented on three grounds:

> (1) Because as shown (p. 69) he considered the *Abilene* and the *Robinson cases* as applying only where the published tariff was observed and not where the published tariff was departed from.

In this Justice Pitney failed, as did the majority, to recognize clearly that the very question upon which the Commission's primary jurisdiction rested in the *Mitchell case* was whether the tariff had been departed from. (See also p. 279.)

> (2) That the *Abilene, Robinson* and *Pitcairn cases* (p. 270) while proper to apply to administrative questions for the future, did not properly apply to judicial questions for past wrongs.

The petitioners most respectfully suggest that Justice Pitney either must have meant to disagree with the *Abilene case* or have overlooked the fact that that case dealt entirely with damages for past wrongs. More particularly, however, Justice Pitney overlooked the controlling consideration in the *Abilene, Pitcairn* and *Robinson cases,* that is, that the necessity of uniformity was as great in the past as in the future,

and that therefore the Commission's primary jurisdiction was equally essential. This, as has been already noted, the majority of the court in the *Mitchell case* clearly recognized (pp. 258–260). The portion of Justice Pitney's dissent, however, with which the petitioners are most concerned is his statement on page 281:

> (3) "It is said that the questions that arise about these practices of rebate and car distribution are complicated and difficult. Certainly that objection is not pertinent to the present cases. I see nothing beyond the grasp of a court of law in the *Mitchell case*."

Again, with all due respect, the consideration of difficulty and complication in these questions is only secondary. It might even be conceded that the Commission would be less qualified than a particular court to reach a right conclusion on a particular question. That, however, is not the test. There are hundreds of courts and only one Commission, and whether the Commission's decisions be right or wrong, to give controlling effect to its decisions will obviously assure the essential of uniformity, if nothing else. It is this necessity of uniformity, not of difficulty, not of intricacy, not whether the courts or the Commission are most likely to be right or wrong, which compels resort to the Commission in the first instance.

Passing to the case of *Pennsylvania Railroad* v. *Clark Coal Co.* (238 U. S. 456) it will be found that this court again cites the *Abilene*, the *Pitcairn*, the

Robinson, the *Morrisdale*, and the *Mitchell cases*, in denying the jurisdiction of a State court to entertain a suit under a State statute for treble damages for discrimination in car service, the suit having been instituted after the plaintiff had obtained a finding of discrimination from the Interstate Commerce Commission, but before the Commission had made its formal award of damages.

This case is of particular interest because it supplements the decision in the *Abilene case* as to the jurisdiction retained by the courts under section 9 of the act. On page 470 of its decision, the court holds that where, as in that case, primary resort had been had to the Commission to determine the administrative question involved, the plaintiff need not, unless he chose, proceed to obtain an award of damages from the Commission, but might exercise his election under section 9 to sue in court upon the Commission's finding. The court held, however, that, should he so elect, he was limited by the specific terms of section 9 to suit in a Federal court, and could not sue in a State court unless he first obtained an award of damages from the Commission, when under section 16 he could proceed to enforce such an award in any State or Federal court of competent jurisdiction. This holding makes clear that the doctrine of this court in the *Abilene case* does not in fact render nugatory the specific provisions of sections 9 and 22, preserving to claimants their common-law forums and remedies, but, on the contrary, that a real election as to the final forum in which a claimant

may enforce his rights is effectively preserved, conditioned only on resort first being had to the Commission, where the question involved demands uniformity of decision.

It is, however, desired to make particular reference here to that portion of this court's opinion in the *Clark case* in which this court undertakes to distinguish that case from the *Puritan case* (237 U. S. 121), and the *Mulberry Hill case* (238 U. S. 275), in both of which the jurisdiction of State courts was sustained to entertain suits for damages for inadequate and discriminatory car distribution without preliminary resort to the Commission. On pages 471 to 473 of the opinion of this court in the *Clark case*, it distinguishes the *Puritan case* and the *Mulberry Hill case* on the ground that in the *Clark case* the plaintiff itself had in the first instance invoked the jurisdiction of the Commission, while this had not been done in either of the other cases. Again, with due deference, this distinction, although true, is not the fundamental distinction between the cases. The question in the *Clark case* was whether the rule or method of car distribution of the carrier was unjustly discriminatory, and this court itself clearly recognized (pp. 468 to 469) that even if the plaintiff had not of its own accord proceeded in the first instance to obtain a finding on this question from the Commission, the Commission must in any event have been first appealed to before an action could have been maintained in court. In this connection it will be noted that this court specifically cites the

Abilene, the *Pitcairn*, the *Mitchell* and the *Robinson cases*.

On the other hand, the *Puritan case*, as will be further developed, passed off largely on a question of pleading, and while even though there are other grounds upon which the validity of this court's decision in that case may be questioned, it is clearly distinguishable from the *Clark case* on this ground alone.

This court construed the complaint in the *Puritan case* as claiming damages by reason of the carrier's failure to furnish the plaintiff cars to which it was entitled under the carrier's own rule. (See p. 134 of the opinion.) The carrier made no affirmative defense whatever, but contented itself with a plea to the jurisdiction of the court. In other words, on the pleadings this court was justified in assuming that the carrier admitted the violation of its own rules and that there was therefore no administrative question for the Commission to pass upon, since presumably uniformity would have been obtained by the carrier's adherence to those rules. The *Puritan case* will be further discussed in connection with the cases cited under Point II of the brief, and it will there be pointed out that it is at least doubtful, even on this assumption, whether there should not be preliminary reference to the Commission, since the carrier's own rules might themselves be discriminatory. But in any event it is clear that the real ground of distinction between the *Puritan* and the *Clark cases* is analogous to the distinction already pointed out between

the *International Coal* and the *Mitchell cases*—that is, that in the *Puritan case* the departure from the carrier's own rules was admitted, while in the *Clark case* it was denied, just as in the *International Coal case* the departure from the carrier's own tariffs was admitted, while in the *Mitchell case* it was denied.

Consideration of the *Mulberry Hill case* will be postponed to its consideration in connection with the cases cited under Point II of the brief. It will suffice to say here that this court, in the *Mulberry Hill case*, failed to recognize what it distinctly commented upon in the *Eastern Railway case* (237 U. S. 140, at p. 143), that its decision in the *Puritan case* was based on the character of the pleadings.

Coming to the *Loomis case* (240 U. S. 43), we find this court requiring preliminary recourse to the Commission under circumstances which go even beyond the doctrine of this court in the *American Tie case*. In the *Loomis case*, a shipper of grain sued to recover the cost of grain doors and bulkheads which it had furnished, and which were alleged to have been necessary because of the failure of the carrier to provide suitable equipment. This court notes, on page 48 of its opinion, that—

> The applicable duly filed interstate rate schedules made no reference to allowances for grain doors or bulkheads. * * * Whether there is jurisdiction in the State court to pass upon the carrier's liability incident to the interstate traffic is the sole point demanding consideration.

This court will note from the portion of the quotation which has been italicized that there was apparently no contention in the *Loomis case* that the tariffs provided for any allowances, while in the *American Tie case* it was contended that the tariffs provided a rate on oak crossties. Had this court, therefore, logically carried out the theory of its decisions in the *International Coal case* and in the *Puritan case*, it might well have held in the *Loomis case* that there was no question to be submitted to the Commission, but that the case should be dismissed on its merits. Instead, however, this court held, in the *Loomis case*, that even though the tariffs as stated by this court "made no reference to allowances" preliminary resort must still be had to the Commission to determine whether such allowances could be made consistently with the tariff, primarily in the interest of uniformity, and secondarily, because of the technical nature of the questions involved. In so holding this court, as already noted, would seem to have gone even beyond the strict limits of its doctrine in the *American Tie case*, and therefore even beyond the doctrine which the petitioners contend should control in the case at bar, since here, as in the *American Tie case*, the actual meaning of the tariff is in dispute.

Before leaving the *Loomis case* the petitioners desire to call attention to a further feature of that decision.

In the *Loomis case*, this court, after referring to the *Abilene*, the *Pitcairn*, the *Robinson*, the *Mitchell*, the *Morrisdale*, the *Minnesota Rate cases*, the *American Tie case*, the *Puritan case*, and the *Clark case*, says:

> An adequate consideration of the present controversy would require acquaintance with many intricate facts of transportation, and a consequent appreciation of the practical effect of any attempt to define services covered by a carrier's published tariffs, or a character of equipment which it must provide, or allowances which it may make to shippers for instrumentalities supplied and services rendered. In the last analysis the instant case presents a problem which directly concerns rate making and is peculiarly administrative. * * * And the preservation of uniformity and prevention of discrimination rendered essential some appropriate ruling by the Interstate Commerce Commission before it may be submitted to a court.

It will be noted that in this decision this court required resort to the Commission "to define services covered by a carrier's published tariffs," not only because of the necessity of uniformity, but secondarily because of the intricacy of the questions involved. Indeed, in the *American Tie case*, this court had already recognized this secondary reason for preliminary recourse to the Commission. In that case this court said (p. 146):

> And it is equally clear that the controversy as to whether the lumber tariff included crossties was one primarily to be determined by the Commission in the exercise of its power

concerning tariffs and the authority to regulate conferred upon it by the statute.

As a matter of fact, this secondary consideration of the intricacy of the questions involved, and the Commission's peculiar equipment to solve them, is in truth but a phase of the primary consideration of uniformity. The presumption might be indulged in theory, however unjustifiable in practice, that even though there is only one Commission and there are many courts, all would reach the same conclusion, if all had equal acquaintance with, and facilities for solving the peculiar administrative questions involved. The fact, therefore, that the Commission has an acquaintance with and facilities not open to the courts for the solution of these questions, is in effect only an additional reason why for the sake of uniformity such questions must in the first instance be submitted to the Commission. That this is peculiarly the case in connection with the construction of tariffs will be subsequently further elaborated.

In the case of *Northern Pacific Railway Co.* v. *Solum* (247 U. S. 477) this court holds that before damages can be recovered in a State court for alleged misrouting by failure to send a shipment via a lower rated state, instead of a higher rated interstate, route, recourse must first be had to the Commission to determine whether in fact there was misrouting. In that case this court says (p. 483):

> The shipper, on the other hand, urges that the rule which requires such preliminary

> determination of administrative questions by the Commission applied only to those cases where the question involved is whether a particular rate is unreasonable or whether a particular practice is discriminatory, but the rule is not so limited. It applies, likewise, to any practice of the carrier which gives rise to the application of a rate. Citing, among other cases, *Texas & Pacific Railway Co.* v. *American Tie & Timber Co., supra.*

Here again, therefore, this court reaffirms the principle upon which the *American Tie case* is founded and repudiates the very contention here made by the respondents, that that principle applies only where it is contended a particular rate is unreasonable or a particular practice discriminatory.

Finally, in the case of *Director General* v. *Viscose Co.* (254 U. S. 498) this court, in setting aside an injunction against the filing of a tariff canceling rates on silk so as to include silk among articles which will not be accepted for shipment, said, citing the *American Tie case* among others:

> The importance to the commerce of the country of the exclusive initial jurisdiction which Congress has committed to the Interstate Commerce Commission need not be repeated and can not be overstated.

It is not necessary to refer in detail to the remaining cases cited under Point I, with the exception of the case of *United States* v. *Pacific & Arctic Co.* (228 U. S. 87), to which further reference will presently be made. Enough to say that they are in

general consistent with the *American Tie* and *Abilene cases* in holding that there must be preliminary recourse to the Commission to determine administrative questions, and that the jurisdiction of the courts in enforcing rights in connection with such questions is confined to the subsequent enforcement of such rights under sections 9 and 16 of the act, or to the review of the Commission, the latter, however, solely where the Commission has exceeded its delegated powers or has acted under mistake of law, or arbitrarily in the absence of any competent evidence.

Sufficient, it is hoped, therefore, has been said to demonstrate:

(1) That the *American Tie case* clearly and unmistakably requires preliminary resort to the Commission to determine a disputed question of tariff construction.

(2) That this requirement is based primarily on the necessity of uniformity in the decisions of such questions, and secondarily, on considerations of the intricacy of the questions themselves and, the Commission's peculiar opportunities for familiarity with them, and facilities for determining them.

(3) That while a superficial consideration of the decisions of this court subsequent to the *American Tie case* might lend some color to the contention that the original scope of that decision has since been modified, even by the decisions of this court consistent in result with that decision, more careful

analysis of those decisions demonstrates, on the contrary, that they are fundamentally consistent with the full scope of the doctrine of the *American Tie case* and in no way limit that doctrine.

Consideration, therefore, will now be given to the question of whether that doctrine has in any way been limited by the decisions of this court cited under Point II of the brief, or whether such decisions are distinguishable from the *American Tie case*.

(b) The decisions of this court cited under Point II of the brief in no way limit or qualify the doctrine of the American Tie case, but are distinguishable from that case and, therefore, equally distinguishable from the case at bar and from the Reliance Elevator case.

The decisions cited under Point II of the brief comprise not only all of the decisions of this court which the Supreme Court of Minnesota cites under Point IV of its opinion in the *Reliance Elevator case*, supra, but in addition other decisions of this court, some of them subsequent to the *Reliance case*, in which, under the peculiar circumstances of the respective cases, this court has sustained the jurisdiction of a court over questions arising under the Interstate Commerce Act, of a character which this court has generally recognized to be primarily within the jurisdiction of the Commission. A brief analysis of these decisions will, therefore, now be undertaken, to show that they in no way limit or modify the doctrine of this court in the *American Tie case*, but are clearly distinguishable from that case and, therefore, from the case at bar.

It would seem that the simplest way of making this analysis would be to consider such decisions in chronological order.

In *Wight* v. *United States* (167 U. S. 512) this court sustained an indictment for the violation of section 2 of the act by reason of the Baltimore & Ohio Railroad allowing one Bruening 3½ cents per hundredweight for hauling his shipments of beer from the Baltimore & Ohio depot to his warehouse. The shipments originated in Cincinnati and could have been carried over either the Panhandle or the Baltimore & Ohio to Pittsburgh, the Panhandle having a direct track connection with Bruening's warehouse, but the Baltimore & Ohio being only able to make delivery by truck. The alleged violation of section 2 was in the making of such allowances by the Baltimore & Ohio to Bruening without making similar allowances to all other consignees at Pittsburgh. No point was made of record, nor did this court discuss the question, as to whether there should have been preliminary resort to the Commission to determine whether the services to the several consignees were in fact similar. Indeed, it would appear from this court's opinion, though it is not expressly stated, that the allowance was not published; and it would appear from the opinion of this court in the *Mitchell case* (230 U. S. 247, at p. 260), where the *Wight case* is referred to, that this court construes the *Wight case* as being based upon the admitted departure from the published tariffs. It must be remembered in this connection, however,

that the indictment was for a violation of section 2 and not of section 6, and therefore it would seem more probable that the attention of this court in this early case, not having been called to any question of the court's jurisdiction, this court did not, in fact, consider that question.

In the case of *Southern Railway Co.* v. *Tift* (206 U. S. 428) this court sustained an injunction against the enforcement of unreasonable rates. This injunction was granted before 1906, and therefore before the Interstate Commerce Act afforded the Commission any way of compelling a carrier to desist from charging the rate condemned, and was in fact granted to enforce a precedent finding by the Commission that the rates were unreasonable. It is to be noted, moreover, that the Federal court which finally granted the injunction refused to do so until the Commission had been appealed to and had made its finding. There is another aspect of the case which likewise requires consideration. The Supreme Court, in addition to affirming the jurisdiction of the Federal court to enjoin the charging of the rates condemned by the Commission, sustained the jurisdiction of that court to require "restitution" during the period in which those rates were in effect. The order of "restitution" was expressly sustained on the ground of a stipulation to that effect between the parties, and this court in the *Pitcairn case* (215 U. S. 481, at p. 500) distinguished the "restitution" in the *Tift case* on the basis of this stipulation. It is not necessary to con-

sider whether under the law as it now stands this court would permit such a stipulation.

In *Louisville & Nashville Railroad Co.* v. *Cook Brewing Co.* (223 U. S. 70) this court sustained an injunction restraining a carrier from refusing to accept interstate shipments of beer to local option points in Kentucky. It appeared that the carrier had filed with the Interstate Commerce Commission a circular notice directing its agents to refuse to receive such shipments. The court says (pp. 83 to 84):

> The fact that the circular notice of the company referred to was filed with the Interstate Commerce Commission is incidentally stated in the answer of the company, and this fact is now made the basis for an argument that neither the State court nor the Circuit Court had any jurisdiction, and that an application should have been made to the Interstate Commerce Commission for an order requiring the railroad company to desist from refusing to transport such articles in interstate commerce.
>
> Why should the brewing company have made complaint to the Commission? What relief could it afford? *There was no tariff question.* There was no discrimination against shipments tendered by complainant and like shipments tendered by other brewers to the same points. There was no claim that the commodities tendered were inherently dangerous to transport, or that the railroad company did not have transportation facilities. Evansville was not discriminated against in

favor of like shipments to the same points. To say that there was a discrimination between shipments of intoxicants and other commodities does not make a case of discrimination or preference where the denial of such shipments is based, as is the case here, wholly and solely upon an illegal restraint upon that kind of interstate commerce, is to reason in a circle, for the question comes back at last to the validity of the law forbidding such shipments. There was no discrimination if the law was valid, and the result must turn, not upon any administrative question or questions of fact within the scope of the power of the Commission, but upon the validity of the legislation which controlled the action of the carrier. That is a question of general law for a judicial tribunal, and one not competent for the Commission as a purely administrative body.

The decision in the case of *Texas & Pacific Railway* v. *Abilene Cotton Oil Co.* (204 U. S. 426), is not applicable here. The question there was one of the reasonableness of a rate. Such a question is primarily one of administrative character, and the propriety of a prior resort to the Commission to obtain a ruling upon the question of reasonableness involved the very heart of the whole statute. That there might be uniformity in rate making necessarily required a resort to that body as a basis for a common law recovery of an excessive charge.

It will be noted that this court specifically states that "there was no tariff question" involved. Appar-

ently, therefore, this court did not treat the circular filed with the Commission as a tariff. If it had so considered it, the case would then have been indistinguishable from the case of *Director General* v. *Viscose Company* (254 U. S. 498), already discussed, and it must be assumed that this court would, in such event, have required primary recourse to the Commission.

In the case of *Galveston, Harrisonburg & San Antonio Railway Co.* v. *Wallace* (223 U. S. 481) it was merely contended that under section 9 of the Interstate Commerce Act a State court had no jurisdiction of an action for damages for nondelivery of a shipment, but that there was exclusive jurisdiction in the *Federal courts*. This court says (pp. 489 to 490):

> It was contended that *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.* (204 U. S. 426) ruled that this jurisdiction was exclusive, and from that it was argued that no suit could be maintained in a State court on any cause of action created either by the original act of 1887 or by the amendment of 1906. But damage caused by failure to deliver goods is in no way traceable to a violation of the statute, and is not, therefore, within the provisions of sections 8 and 9 of the act to regulate commerce. *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186, 208.

It will be noted that there was no question before the court as to whether preliminary recourse to the Commission was necessary. It would seem clear,

however, that in such an action there would be no considerations of uniformity which would require such preliminary resort to the Commission. It should be noted, moreover, that in the case of *Louisville & Nashville Railroad* v. *Ohio Valley Tie Co.* (242 U. S. 288), cited under Point I of the brief, it was held that the Commission, in awarding damages for a violation of section 1 of the act in the charging an unreasonable rate, had jurisdiction to award any incidental damages which the complainant might have suffered to its business, and that the satisfaction of the Commission's award barred a subsequent action in court for such additional damages.

In the case of *Pennsylvania Railroad* v. *International Coal Co.* (230 U. S. 184) this court sustained the jurisdiction of a Federal court to award damages because of rebates paid other shippers from the published rates, but reversed the judgment awarding damages on the ground that there had been no proof of actual damage, and that the mere payment of rebates to other shippers did not *ipso facto* establish damage to the extent of the difference between the published rates charged the plaintiff and the reduced rates charged the other shippers.

The only question with which we are here concerned, however, is the holding of this court that a court had jurisdiction of such an action. This case has already been referred to in connection with the discussion of the *Mitchell Coal case* under the preceding heading of this argument, where petitioners

undertook to show that this court in distinguishing this case from the *Mitchell case* had not reached the fundamental distinction. It was there pointed out that the real distinction between the cases was that in this case the departure from the published tariff was admitted, and that there was, therefore, no necessity of primary recourse to the Commission, because presumably uniformity was insured by adherence to the published tariff, while in the *Mitchell case* the departure from the published tariff was denied, which, in order to insure uniformity, required preliminary recourse to the Commission to determine whether there had been such departure.

In the *International Coal case,* moreover, the defense was not that there had been no departure from the published rate, but merely that there was no discrimination because of the difference in services to the respective shippers. This court rightly holds (p. 196 to 197) that the question as to whether there might properly have been a difference in the rates for the respective services could not have been considered either by the Commission or the court, because such difference was not recognized in the only way in which it could have been legally done; that is, by the publication of different rates. This court says (p. 196):

> Under the statute there are many acts of the carrier which are lawful or unlawful according as they are reasonable or unreasonable, just or unjust. The determination of such issues involves a comparison of rate with

> service, and calls for an exercise of the discretion of the administrative and rate-regulating body. For the reasonableness of rates and the permissible discrimination based upon difference in conditions are not matters of law. So far as the determination depends upon facts, no jurisdiction to pass upon the administrative questions involved has been conferred upon the courts. That power has been vested in a single body so as to secure uniformity and to prevent the varying and sometimes conflicting results that would flow from the different views of the same facts that might be taken by different tribunals.
>
> None of these considerations, however, operates to defeat the court's jurisdiction in the present case. For even if a difference in rates could be made between free and contract coal, none was made in the only way in which it could have been lawfully done. The published tariffs made no distinction between contract coal and free coal, but named one rate for all alike.

It will, therefore, be seen that all this court actually held in the *International Coal case* was that the trial court had jurisdiction to award such actual damages as the plaintiff might be able to show resulted to it by reason of the admitted departure from the published rate in favor of other shippers, and that there was no question for the Commission to pass on, because, on the one hand, the departure from the published tariffs was admitted, and on the other, the defense of nondiscrimination was irrelevant. This court did

not hold in the *International Coal case* that if, as in the *Mitchell case*, the departure from the tariff was denied, that the court in such event would still have had jurisdiction without preliminary recourse to the Commission to determine whether there was in fact such a departure. Still less, of course, did this court hold that had there actually been two published rates for the services to the respective shippers and discrimination charged to result from the published rates, that the action might have been maintained without preliminary resort to the Commission. Clearly, in either of these events, there would have arisen administrative questions which the Interstate Commerce Commission must have first determined.

It is perhaps opportune to mention here, what will be further developed, that what this court in its decisions has repeatedly referred to as an administrative question without, so far as petitioners are aware, defining the meaning of the term "administrative," is essentially nothing more or less than such a question arising within the administrative functions of the Commission, as requires uniformity of decision in order to insure the uniformity of rates and services which it is the object of the Interstate Commerce Act to secure.

In *Florida East Coast Lines* v. *United States* (234 U. S. 167) this court reversed the District Court which had refused to enjoin an order of the Commission directing a reduction of rates on the ground of unreasonableness. This court did so, however, solely on the ground that the Commission had acted without

any competent evidence to support its order, and that, therefore, as a matter of law, its order was void.

The case of *Pennsylvania Railroad* v. *Puritan Coal Co.* (237 U. S. 121) has already been somewhat discussed in connection with the consideration given under the first division of this argument to the case of *Pennsylvania Railroad* v. *Clark Coal Co.* (238 U. S. 456). It is there pointed out that this court in distinguishing that case from the *Puritan case* did not point out the fundamental distinction any more than this court had done in distinguishing the *International Coal case* from the *Mitchell case*. It was there suggested that the fundamental distinction between the *Puritan case* and the *Clark case* was that the question in the *Clark case* was whether the carrier's rule of car distribution was unjustly discriminatory, while in the *Puritan case*, because of the character of the pleadings, the only question was whether the plaintiff had been damaged by the admitted departure from the carrier's own rules. It was further pointed out that this court had expressly recognized in the case of *Eastern Railway Co.* v. *Littlefield* (237 U. S. 140) that the court's jurisdiction in the *Puritan case* was sustained largely on the nature of the pleadings. Indeed, in the *Puritan case* itself, this court, at page 130, commented on the difficulty of deciding the question of jurisdiction because of the nature of the pleadings.

It has already been suggested, in the previous discussion of the *Puritan case*, that, even assuming that the violation of the carrier's own rules was ad-

mitted, it was at least doubtful whether preliminary resort to the Commission should not be required. It is here desired to further consider this suggestion. On pages 131 to 132 this court says:

> * * * It must be borne in mind that there are two forms of discrimination—one in the rule and the other in the manner of its enforcement; one in promulgating a discriminatory rule, the other in the unfair enforcement of a reasonable rule. In a suit where the rule of practice itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the judgment and discretion of the administrative power which has been vested by Congress in the Commission. It is for that body to say whether such a rule unjustly discriminates against one class of shippers in favor of another. * * *
>
> But if the carrier's rule, fair on its face, has been unequally applied and the suit is for damages, occasioned by its violation or discriminatory enforcement, there is no administrative question involved, the courts being called on to decide *a mere question of fact as to whether the carrier has violated the rule to the plaintiff's damage.*

In the first place, it is most respectfully suggested that the language of the above quotation which has been italicized is misleading. Without reference to the soundness of the distinction which this court suggests, it is obvious that what this court meant was that it was a *mere question of fact as to whether the plaintiff had been damaged* by the (admitted)

violation of the rule, and that this court did not mean to say that *it was a mere question of fact whether the carrier had violated the rule*. This is pointed out because otherwise the court's language would lend color to the contention made in the case at bar that a court could decide whether the rule had been violated. Even assuming, however, that the meaning here suggested is the real meaning which the court intended to convey, the petitioners feel warranted in at least questioning the soundness of the holding.

It seems that there would at least be force in a contention that a shipper should not be permitted to recover damages even where the violation of a carrier's rule is admitted, without preliminary recourse to the Commission, because it might well be that the rule itself would be discriminatory as against other shippers and that the plaintiff itself therefore was not entitled to demand its observance. In view of the necessity of uniformity of car distribution among the shippers of the country as a whole, it seems extremely doubtful whether the necessity for preliminary resort to the Commission should be left to depend upon the raising of the question of the propriety of the rule either by the carrier, who naturally would not attack it, or by the shipper, who might be unduly favored by it.

However this may be, one thing is clear in the *Puritan case*, as it was clear in the *International Coal case*, that this court did not hold that had the question been presented on the record as to whether or not the carrier's own rule had been departed from,

instead of the departure being admitted, the court would still have been held to have jurisdiction without preliminary recourse to the Commission.

The case of *Eastern Railway Co.* v. *Littlefield* (237 U. S. 140), as has just been noted, is on all fours with the *Puritan case*, and it is therefore unnecessary to repeat what has just been said.

The case of *Illinois Central* v. *Mulberry Hill Coal Co.* (238 U. S. 275), it has likewise already been noted, purports to be based on the *Puritan case*, but fails to recognize, what this court had already recognized in the *Eastern Railway case*, that the *Puritan case* was controlled by the nature of the pleadings. It is difficult to see, in the *Mulberry case*, how this court avoided the conclusion that the State statute could be otherwise than a direct burden on interstate commerce, since it had been construed by the State supreme court as requiring the carrier to furnish cars within a reasonable time, as and leaving to the court instead of to the Commission the decision as to what was a reasonable time, depending on the circumstances and conditions of a given case "including the requirements of the interstate commerce carried on by the corporation." In fact, the petitioners are again forced to the conclusion that the *Mulberry* decision can only be accounted for by the peculiar nature of the pleadings in that case and by the failure of this court to recognize, in that case, what it had already recognized in the *Eastern Railway case*, that the *Puritan case* itself was controlled by the nature of its own pleadings.

In the case of *Philadelphia & Reading Railroad Co.* v. *United States and Allentown Portland Cement Co.* (240 U. S. 334) this court merely set aside an order of the Commission based on a finding of discrimination, because the court held that the facts did not, in law, support such a finding.

In *Pennsylvania Railroad Co.* v. *Jacoby* (242 U. S. 89) this court set aside an award of damages by the Commission for car discrimination, again merely because of an error in law as to the measure of damage.

The case of the *Pennsylvania Railroad* v. *Sonman Company* (242 U. S. 120) the petitioners must confess they are unable either to distinguish or reconcile with any other decision of this court. They do not question the soundness of that portion of this court's opinion, page 124, which says:

> The act does not supersede the jurisdiction of State courts in any case, new or old, where the decision does not involve the determination of matters calling for the exercise of the administrative power. * * *

What they are unable to follow is this court's conclusion that no such question was involved in that case. It is to be noted that this court rests its decision largely upon the *Eastern Railway*, the *Puritan* and the *Mulberry Hill cases*. As has already been seen the *Puritan* and *Eastern Railway cases* were expressly controlled by the peculiar nature of the pleading in those cases, under which the departure from the carriers own rules was taken as admitted. The *Mulberry Hill case*, it has moreover been seen, was

based on the *Puritan case* through a failure to recognize the controlling nature of the pleadings in that case. This court, however, expressly based its decision in the *Mulberry case* on the ground that there was no attack on the carriers rules. In the *Sonman case*, on the contrary, not only was there no admission by the carrier that its rules had been departed from, but the carrier itself contended that its rules did not permit the furnishing of all cars which the shipper demanded, and that its rules were reasonable and proper in this respect (see p. 126). In fact it is difficult to escape the conclusion that in the *Sonman case* this court went far beyond any decision before or since that case, in sustaining the jurisdiction of the court without preliminary resort to the Commission. Furthermore it would appear that the underlying reason for this was that this court in fact, though not in terms, undertook to decide the merits of the carriers rule, a question which, under the *Abilene case* and the cases following it, this court has recognized to lie as far beyond its original jurisdiction, as beyond that of any other court.

The case of *Swift & Company* v. *Hocking Valley Railroad Co.* (243 U. S. 281) is merely referred to here because of a remark in the opinion which, taken without its context, might be misleading. On page 290 of its opinion this court said:

> It can not be said that a charge for detention of a private car and use of a railroad track under such circumstances is unreasonable.

Whether or not such a charge was unreasonable, as has just been seen, was a question which this court had no more right than any other court to consider as an original question. It will be noted, however, that in the following sentence of its opinion this court refers to the upholding of the charge by the Interstate Commerce Commission.

The case of *Pennsylvania Railroad Co.* v. *Kitanning Co.* (253 U. S. 319) deserves particular consideration. In that case the carrier had sued in a State court to collect demurrage charges on frozen ore, and the State court dismissed the suit on the ground that the interstate tariff did not provide for demurrage under the facts of the case. This court reversed the State court, differing with it on the merits of the tariff construction, and held the demurrage collectible under the tariffs. It should be noted, first, that this was a suit by a carrier, and, second, that no question was raised of the jurisdiction either of the State court or of this court to determine the application and meaning of the tariffs. Further consideration will be given this case in the discussion of the question as to whether there is any difference in respect of a court's jurisdiction to construe a tariff where a suit is brought by a carrier rather than by a shipper. It will suffice at this time to say that the petitioners will contend that there is no distinction, and that in case of dispute as to the proper construction of a tariff, the question must be remanded by a court in which the carrier has sued to the Commission for preliminary determination, just as a shipper is required to have

primary resort to the Commission to determine a similar question. In any event, the *Kitanning case* can not be taken as deciding against such a contention, since the question was not raised.

In the case of *St. Louis, Iron Mountain & Southern Railway Co.* v. *Hasty* (255 U. S. 252) this court did not have under consideration an interstate, but a State tariff, and the question was not whether there should be preliminary resort to the Interstate Commerce Commission, but to the State commission, to determine the application of the tariff. This court held that preliminary resort to the State commission was not necessary, because this court assumed (p. 256) that:

> The matter is so free from doubt that there is no occasion to apply to the Commission for a construction, as insisted by appellant under *Texas & Pacific Ry. Co.* v. *American Tie Co.*, 234 U. S. 138, 146.

Far, however, from being free from doubt, a reference to this court's opinion in the *Hasty case* will show that there was extensive evidence before the master in favor of the carrier's contention that the tariff did not include the commodity in question, and this court would seem to have ignored the very reasoning by which it had itself rejected a similar contention in the *American Tie case*, that the question was free from doubt (see pp. 146 to 147 of the opinion in that case). This, again, is a case where this court would appear to have been misled by its own conception of the merits of the disputed question.

It is most respectfully insisted that where there is *any* bona fide dispute this court, equally with all other courts, is without jurisdiction to decide the merits of it until the Commission has passed upon it, and then can only review the Commission if the Commission has acted arbitrarily. As has been seen, however, the *Hasty case* does not involve interstate, but State traffic, and therefore may be disregarded. Moreover, the language quoted recognizes, at least by implication, that *if there is any doubt* resort must first be had to the Commission.

In the case of *Central Railroad* v. *United States*, decided December 5, 1921, this court sustained an injunction restraining the enforcement of an order of the Interstate Commerce Commission requiring the removal of alleged discrimination in connection with the privilege of creosoting in transit of forest products. In so doing this court merely held that the facts did not in law warrant an order based on discrimination, though "the Commission *might*, therefore, acting under section 1, have directed the Central and the Pennsylvania to establish the creosoting in transit products at Newark *if it deemed failure to do so unreasonable or unjust.*" It will be noted that this court did not undertake to determine whether the facts proved that it was unreasonable or unjust to refuse to establish the creosoting in transit products at Newark, but expressly recognized that this was a question for the decision of the Commission.

The case of *Schaff, Receiver,* v. *Famechon Co.*, decided by this court, February 27, 1922, dismissed a

writ of error to review the decision of the Supreme Court of Minnesota on the ground that such review should have been sought by a petition for writ of certiorari, in that no question was involved of the validity of an authority exercised under the United States. Had this case been considered on its merits, it would appear that it might have involved the same question as is involved in the case at bar.

This somewhat extended discussion of the cases cited, under Point II of the brief, has been necessary in order to demonstrate what has already been shown in connection with the cases cited under Point I; that is, that whatever justification these decisions may seem to offer, when superficially viewed, for a contention that the original doctrine of the *American Tie case* has since been limited or modified, more careful analysis shows them to be either entirely consistent with that doctrine, or to be themselves distinguishable either on the pleadings or facts.

With the same purpose, brief consideration, therefore, will be given to the decisions of the State and subordinate Federal courts cited under Points III, IV, and V of the brief. This argument will then be concluded by a discussion of the question, which after all must be the real question for this court to decide; that is, whether the doctrine of the *American Tie case* is in itself a correct doctrine which should be reaffirmed, or whether that doctrine should now be modified or repudiated.

II.

Decisions of State and subordinate Federal courts.

To avoid further unduly protracting this argument, the decisions of State and subordinate Federal courts cited under Points III, IV, and V will not be discussed in detail. It will suffice to say that the only decisions of State or subordinate Federal courts since the decision of this court in the *American Tie & Timber case* which have followed that decision, are the two cited under Point IV of the brief, *Cheney* v. *Boston & Maine Railroad Co.*, 116 N. E. (Mass.) 410, and *Poor* v. *Western Union Telegraph Co.*, 196 S. W. (Mo.) 28.

In the cases cited under Point III of the brief, the State and subordinate Federal courts have either ignored the decision of this court in the *American Tie case* or have misconstrued it, or conceivably, have considered it modified by language in the subsequent decisions of this court discussed under Points I (*a*) and I (*b*) of this argument. In this respect particular attention is called to the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *National Elevator Co.* v. *C., M. & St. P. Ry. Co.* (246 Fed. 588), cited by the Supreme Court of Minnesota as supporting the decision of that court in the *Reliance Elevator case*, and therefore in the case at bar. It will be observed that the Circuit Court of Appeals does not even refer to the *American Tie* decision.

In the case of *Francisconi* v. *Baltimore & Ohio Railroad* (247 Fed. 687) the Circuit Court of Appeals

for the Second Circuit, referring to the *American Tie case* in connection with a suit for damages for delay to two private tank cars owned by the plaintiff, the compensation for the use of which the carriers contended, was fixed by the mileage allowance in the published tariffs, said:

> If this case means generally that the interpretation of all rules must be fixed first by the Commission, then no case can come up in court involving the meaning of any rule unless the parties agree upon that meaning. In that case the question was of rates, and the case may possibly be taken as deciding that the meaning of rates is always primarily for the Commission. Here, however, is a question whether the rule provides for the involuntary detention of cars; if it does not, that detention was a wrong, and it can not be argued that there is a rate established for a wrong. The mere fact that the enforcement of a rule of the Commission comes incidentally in question does not divest a court of jurisdiction. The Supreme Court has several times enforced such rules or practices of the carriers without preliminary recourse to the Commission. *Pennsylvania R. R. Co.* v. *Puritan Coal Co.*, 237 U. S. 121, 35 Sup. Ct. 484, 59L. Ed. 867; *Swift & Co.* v. *Hocking Valley R. R. Co.*, 243 U. S. 281, 37 Sup. Ct. 287, 61 L. Ed. 722; *Pa. R. Co.* v. *Kitanning Co.* 253 U. S. 319, 40 Sup. Ct. 532, 64 L. Ed. 928. It can not be that the rule is to be enforced only when its meaning is not in dispute, and in the last case cited there was a careful analysis of the meaning

of a rule and a decision as to its application to the case. *Texas & Pac. Ry. Co.* v. *American Tie & Timber Co.*, supra, must be understood as depending upon the fact that it was a rate which was in question.

This opinion of the Circuit Court of Appeals well illustrates how State and subordinate Federal courts have seized upon the superficial aspects of such cases as the *Puritan*, the *Sonman*, and the *Kitanning* cases as a justification for ignoring the doctrine of this court in the *American Tie case*, and for treating that doctrine as having been subsequently modified. The same question involved in the *Francisconi case* has been considered by the Supreme Court of Illinois in the *Gustafson case* (129 N. E. 516), and by the Circuit Court of Appeals for the Eighth Circuit in the case of *Empire Refineries (Inc.)* v. *Guaranty Trust Co. of New York* (271 Fed. 668), with the same result. As in the *Francisconi case*, the courts entirely failed to recognize the necessity of uniformity in the decision of such questions, either as to whether the compensation provided by the tariffs included compensation for delay, or as to whether the tariffs were unreasonable in failing to provide such compensation. Again, like the Circuit Court of Appeals in the *Francisconi case*, the courts have treated the raising of the jurisdictional question as a mere attempt to evade liability.

It would too greatly extend this argument to analyze in detail the decisions of State and subordinate Federal courts cited under Point V of the brief. The dates of those decisions antedating the decision

of this court in the *American Tie case* are there shown, and it is perhaps sufficient to note that they do antedate that decision. If space permitted, certain of these cases would repay detailed analysis and would demonstrate the general lack of appreciation of the controlling force of the necessity of uniformity in deciding such jurisdictional questions. On the other hand, the *American Tie* decision is not even referred to by the courts in the cases of *Western & A. R. Co.* v. *White Provision Co.* (82 S. E. (Ga.) 644), and *Southern Pacific Co.* v. *Frye & Bruhn* (143 Pac. (Wash.) 163), although both decisions were made after the decision of this court in that case.

The case of *Gimbel Bros.* v. *Barrett* (215 Fed. (Dist. Pa.) 104), is analogous on the pleadings to the *Puritan case*, and the court might on this ground have distinguished it from the *American Tie case*. Instead, however, of doing this, the court undertakes to misconstrue the latter case.

In conclusion, on this point it will suffice to say that these decisions of State and subordinate Federal courts fully warrant this court in now making clear, once and for all, what is the jurisdiction of the Commission and of the courts, respectively, with reference to disputed questions of tariff construction, and, perhaps equally important, to make clear the principles upon which such jurisdiction shall be determined.

III.

This court should reaffirm the doctrine of the American Tie case so as to make clear that the requirement of preliminary resort to the commission to determine a disputed question of tariff construction has not been, and will not be modified.

It has been seen that, with two exceptions, both State and subordinate Federal courts have either failed to understand the true scope of this court's decision in the *American Tie case*, or have considered the doctrine of that case modified by subsequent decisions of this court. It has likewise been seen that, while superficially considered, the language used by this court in subsequent decisions lends some color to the contention that the original doctrine has been modified, those cases when properly analyzed are not inconsistent with the full force of that doctrine.

The question which remains to be discussed is the validity of that doctrine itself, in order that this court in re-examining the doctrine should be satisfied that it is a valid and necessary one. Enough has been shown to warrant this court, if so satisfied, in reaffirming that doctrine in unmistakable terms, in order to remove the confusion now existing throughout the State and subordinate Federal courts.

At the outset it should be noted that the doctrine, as petitioners have stated it, contains its own, and what should be, its sole qualification—that is, that the question of construction must be a disputed one in order to require preliminary resort to the Com-

mission. Whether this is indeed the logical limit of the doctrine, it is not necessary to consider at length here, since both in this case and in the *American Tie case* the question was a disputed one and the solution of the dispute was the sole issue before the court.

It will not be amiss, however, to recur briefly to what has already been suggested in connection with questions of car distribution. It has been noted that there would seem to be sound reasons for requiring resort to the Commission as to such questions, even where the carrier's rules are not attacked as either unreasonable or discriminatory, and although the action is based solely on an admitted departure from the rules. This, because it may well be that the enforcement of the rules would itself lead to discrimination against other shippers—a fact which neither the carrier responsible for the rules, nor the shipper claiming the benefit of them, would be prone to bring to light. Since the object of preliminary resort to the Commission, in any event, is to protect the uniformity of rates and of service which it is the primary object of the Interstate Commerce act to secure, it would seem possible to argue, by analogy, that in all cases where the application of a tariff was the basis of recovery or of defense, it might logically be necessary to resort to the Commission in the first instance, even where the application or meaning of the tariff was not disputed. However this may be, there are such obvious practical advantages in assuming that, in the absence of dispute, the undisputed applica-

tion of the tariff will be uniformly applied to all alike, that any hyper-logical considerations are far outweighed. It will therefore be assumed that the requisite uniformity will be insured if resort is required to the Commission only where the question of tariff construction is a disputed one.

Moreover, it seems quite unnecessary to argue to this court the desirability of uniformity in the application of rates and in the rendition of services. However much the members of this court may have differed as to how that uniformity was to be secured, or as to whether a particular case involved the question, this court has never failed to recognize that the primary purpose of the Interstate Commerce act was to secure such uniformity. The discussion here will be confined, therefore, to the question as to whether in order to secure such uniformity, preliminary resort must be had to the Interstate Commerce Commission to decide disputed questions of tariff construction, and whether, therefore, as a necessary corollary, the courts must be excluded from the primary consideration of such questions.

It has already been noted that preliminary resort to the Commission is required, not primarily because the Commission is more apt to be right than a court, but because, right or wrong, the observance of the Commission's construction will insure uniformity, since there is only one Commission and there are many courts.

Secondarily, however, this court has recognized, and it is undoubtedly true, that the facilities of the

Commission for the solution of such questions, together with the inevitable acquisition of specialized knowledge which the Commission must obtain from its continuous consideration of them, would seem to make the correct solution of such questions more probable by the Commission than by the ordinary court. In this connection it should particularly be remembered that the decision of such questions frequently depends upon the application of the Commission's own rules and regulations for the publication and filing of tariffs and prescribing the nature and character of their contents—regulations and rules which the Commission is expressly empowered by section 6 of the act to prescribe. Indeed it is to be noted that one of the specific grounds upon which this court, in the *American Tie case*, required preliminary resort to the Commission for the construction of a tariff was that such a controversy

> "was one primarily to be determined by the Commission in the exercise of its power concerning tariffs and the authority to regulate conferred upon it by the statute."

As illustrating the complex and voluminous rules and regulations involved in the construction of a tariff, the petitioners are appending to this brief for the information of the court a copy of the Commission's Tariff Circular 18–A. It will be noted that this circular has been entitled by the Commission "Regulations to govern the construction and filing of freight tariffs and classifications and passenger fare schedules. Administrative rulings."

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An examination of the circular will disclose that it contains some 85 pages of rules as to the publication, filing, and contents of tariffs, and some 35 pages of administrative rulings interpreting these rules. It is proper to say here that none of these rules or administrative rulings is specifically referred to in the record in this case, and this tariff circular is appended to this brief, not for the purpose of determining the merits of the tariff question here involved, since the merits are not before this court, but merely as illustrative of the considerations which may enter into the determination of such a question.

Attention has, however, already been called in the Statement of Facts herein, to the fact that the very language of the tariff, which is here in dispute, is language copied verbatim from the order of the Commission suspending the tariff previously published. It would seem, therefore, that this is peculiarly a case where the Commission is best qualified to reach a correct conclusion as to the meaning of that language. The petitioners, however, desire to repeat what they have already mentioned in the Statement of Facts; that is, that they do not urge this accidental circumstance as the fundamental ground for requiring resort to the Commission, or as distinguishing this case from any other case in which there is a dispute as to the proper construction of a tariff, since as has already been pointed out, the controlling reason for such resort is not to secure correctness, but to secure uniformity, of decision.

What objections, then, can be urged to requiring, in the interest of uniformity, preliminary resort to the Commission to determine a disputed question of tariff construction? The petitioners have endeavored to discover any objections that present even the slightest plausibility, and these objections will now be considered.

First.—That a published rate, being a fixed and definite numerical symbol, is not open to construction, and uniformity can therefore be secured by requiring resort to the Commission before any change is made in the rate, and by requiring its strict observance until so changed. That, on the contrary, in the everyday application of a tariff, each agent of the carrier must of necessity construe the language of the tariff, and consequently there is no way of insuring uniformity of construction. This objection is so far valid that it must be admitted that the same uniformity can not be secured in the construction of language as is possible in the observance of a definite numerical symbol. This does not mean, however, that, entire uniformity in the construction of tariffs being impossible, no effort should be made to insure as much as is possible, and it is self-evident that the maximum uniformity will be obtained if, when a dispute arises as to the proper construction, that dispute is left to the decision of one tribunal in place of being left to the varying decisions of many. At least when the question is decided there will then be no further excuse for any lack of uniformity. Moreover, it should be noted that the same objection may

be made with equal force to requiring preliminary resort to the Commission to decide whether or not discriminations exist in rates or services. Many such discriminations are inevitable and yet remain undiscovered. No one, however, suggests that the courts and not the Commission should determine the fact of discrimination merely because discriminations in general do not come to light until they become the subject of controversy.

Second.—It may be suggested that uniformity of construction can be obtained through review of the decisions of the various courts, while no such uniformity of rates could be obtained merely by review, if the fixing of rates were left to the courts. It is not entirely clear whether even in theory the suggested distinction exists. If it does, it rests essentially on the supposition that questions of construction of language are questions of law, and that the presumption must be indulged that any conflicts between the lower courts as to questions of construction can, like errors of law, be uniformly and properly corrected by review. Aside from the highly impractical character of such reasoning, it rests on a fallacious premise. Questions of construction of tariffs are not questions of law, but are essentially questions of fact, depending upon practical and technical considerations peculiarly within the knowledge of the Commission and, as has been seen, frequently requiring the Commission to construe the rules and regulations which it is specifically, and alone, empowered by the act to prescribe.

Third.—That there is no definite procedure prescribed by the act which affords a carrier the means for preliminary resort to the Commission, where a carrier, and not a shipper, sues to enforce its construction of a tariff. Therefore, since jurisdiction must be left to the courts to determine questions of tariff construction where a carrier, and not a shipper, is the plaintiff, there is no reason for not leaving the courts jurisdiction where a shipper is plaintiff. Even, however, if the assumption were correct, that the courts must be allowed to retain jurisdiction to decide such questions where a carrier is plaintiff, the conclusion would not follow that such jurisdiction must be left to the courts where the shipper sues. Again, it would merely be a case of securing the maximum possible uniformity by requiring a shipper in any event to have preliminary resort to the Commission. But the assumption is not correct that such preliminary resort is not open to a carrier, and therefore that the courts retain jurisdiction of such questions in a suit by a carrier. The petitioners are confident that were this specific question presented to this court, this court could find ample justification for construing the provisions of section 13 of the act, empowering the Commission to enter upon investigations of its own initiative, as broad enough to provide the necessary procedure to enable a carrier to obtain the decision of such a question from the Commission. Likewise, it may be objected that, even if such procedure be available, it is not practicable to

require a carrier whenever it sues—as, for instance, to enforce the collection of a rate or charge specified in the tariff—to first obtain a construction by the Commission of the meaning of the tariff. The answer to this objection is found in the limitation on the requirement of preliminary resort to the Commission which the petitioners have already noted; that is, that such resort is not required unless the application or meaning of the tariff is disputed. The petitioners believe therefore that, where a carrier sues, a court will be warranted in assuming jurisdiction, unless on the pleadings or at a trial a dispute arises as to the proper meaning or application of the tariff. In the event of a bona fide dispute so arising, the court can then remand the question to the Commission for decision or abate the case until application has first been made to the Commission.

It may be admitted in this connection that questions concerning the statute of limitations may arise in connection with preliminary resort to the Commission, because the limitation of time in which application must be made to the Commission to determine such questions may conceivably conflict with the varied limitations of time in which such actions could otherwise be maintained in the courts. It, however, is not necessary to consider such questions here, as they do not arise on this record, and the petitioners believe that, if they should arise, they can be reconciled without disregarding the obvious necessity, in any event, of preliminary resort to the Commission.

Finally, it is insisted that the criminal provisions of the act would be seriously interfered with and rendered unconstitutional if, before an indictment could be sustained for violation of a tariff, preliminary resort must be had to the Commission to determine the meaning or application of the tariff. It is claimed (*a*) that such a doctrine would make the Commission at once judge and prosecutor and (*b*) that it would render the acts made criminal so indefinite as to violate constitutional requirements. As to (*a*), it will suffice to say that the Commission is not the prosecutor under the act, but the prosecutor is the Attorney General, and that so far as the Commission in its administrative capacity acts as judge it would, of course, have to afford full opportunity to the accused to be heard. As to (*b*), it will suffice to say that there can be no more objection to the determination by the Commission, after the fact, as to what was the correct meaning of the tariff, than there can be to the determination of the same question by a court, likewise after the fact, and that the decision of the Commission there will have the great advantage of uniformity, which will prevent prosecution of a man in one jurisdiction for the very act which a court in another jurisdiction might not consider to be a violation of the same tariff.

Finally, it can be answered that this is not a criminal case, but that if it were this court has met and considered and overruled these very objections in the case of *United States* v. *Pacific & Arctic Co.* (228 U. S. 87). In that case this court set aside the

conviction of a rail carrier for criminal discrimination in refusing to accord through routes to one steamship line while affording through routes to other steamship lines in which the rail carrier was interested. This court said (pp. 106 to 108):

> The decisions of the District Court upon counts 3, 4, and 5 must be determined upon different principles than those which we have just expressed in passing on counts 1 and 2. (For violations of the Sherman Anti-Trust act.) The District Court, as we have seen, decided that the conduct of the defendants was not subject to judicial review in a criminal or civil case until it had been submitted to and passed upon by the Interstate Commerce Commission. The Government attacks the conclusion with arguments of great strength and contends that it makes the Commission not only the judges of the civil relief that private shippers may be given against the carriers by the interstate commerce act, but gives the Commission the control and practical determination of the criminal provisions of the law. The argument, in effect, is that the conclusion of the District Court confounds the civil and criminal remedies of the law, the private injury, and the public injury resulting from the violation of its provisions. And who, it is asked, will initiate the criminal proceeding and by what proof will it be supported? What degree of proof is to be accorded to the finding of the Commission—presumptive or conclusive? If neither, it is argued, "it would be a senseless thing to regard such a finding as a condition precedent

of the United States to indict." If, it is asked further, the finding of the Commission is to have either *prima facie* or conclusive effect, against whom is it to have such effect? If against a defendant, what becomes of the sixth amendment to the Constitution? The The argument of the Government is cast in a series of questions which end in the final answer, as it is contended, that under the decision of the District Court the Interstate Commerce Commission "becomes practically the court of final criminal jurisdiction."

The contentions of the Government would be formidable indeed if the Interstate Commerce Act was entirely criminal. But it is more regulatory and administrative than criminal. It has, it is true, a criminal provision against violations of its requirements, but some of its requirements may well depend upon the exercise of the administrative power of the Commission. This view avoids the consequences depicted by the Government. It keeps separate the civil and criminal remedies of the act, each to be exercised in its proper circumstances. It makes the Interstate Commerce Act what it was intended to be and defined to be in the cases cited by the District Court, to wit: *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.* and *Baltimore & Ohio Railroad Co.* v. *Pitcairn Coal Co., supra.* And it would, in our judgment, be an erroneous view to take that the great problems which the act was intended to solve and the great purposes it was intended to effect should be considered of less consequence than the facility

> which should be given to some particular remedy, civil or criminal. We need not extend the discussion. The purpose of the Interstate Commerce Act to establish a tribunal to determine the relation of communities, shippers, and carriers and their respective rights and obligations dependent upon the act has been demonstrated by the cited cases, and also the sufficiency of its powers to deal with the circumstances set forth in the indictment.

These, then, comprise all possible objections to requiring preliminary resort to the Commission for the determination of a question of tariff construction, which have occurred to the petitioners in their analysis of that question, and they have endeavored to overlook none. It is, of course, possible that they have done so. If they have, it is assumed that such as there may be will be suggested by counsel for respondents or will occur to the court. The petitioners are confident, however, that none can be raised potent enough to overcome the controlling consideration upon which the requirement of such preliminary resort rests—the necessity of uniformity in the decision of such questions.

In conclusion, therefore, the petitioners submit that much of the misunderstanding of this requirement will be removed when it is generally appreciated that it does not render nugatory the provisions of sections 9 and 22 of the act, which specifically reserve to claimants their choice of forum, but that, merely in the interest of uniformity, resort is required to the Commis-

sion in the first instance, without, however, in reality depriving claimants of their election as to the forum in which they shall finally enforce their rights, once the preliminary question has been determined by the Commission. Moreover, the petitioners believe that if it is understood that the justification for preliminary resort to the Commission lies essentially in the necessity of uniformity of decision, whether right or wrong, and not in any invidious comparison of the relative ability of the courts and of the Commission to decide such questions, the courts will be the more willing to observe this requirement.

The petitioners, therefore, most respectfully submit that, in order to insure that uniformity of rates and services which this court has recognized it is the primary purpose of the interstate commerce act to secure, this court should now make clear, once and for all, that preliminary resort must be had to the Commission to determine a disputed question of tariff construction, and that the courts must be excluded from the original consideration of such a question.

Respectfully submitted.

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Attorneys for Petitioners.

WASHINGTON, D. C., *April —, 1922.*

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IN THE

Supreme Court of the United States

October Term, 1921.

No. 202

GREAT NORTHERN RAILWAY COMPANY and JOHN BARTON PAYNE, Director General of Railroads, *Petitioners*,

v.

MERCHANTS ELEVATOR COMPANY,

On Writ of Certiorari to the Supreme Court of the State of Minnesota.

BRIEF FOR RESPONDENT

HAROLD G. SIMPSON,
Attorney for Respondents.

WASHINGTON, D. C., April , 1922.

INGLE, INC., 165 William Street, New York City.

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List of Cases Cited

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BRIEF FOR RESPONDENT.

Statement of Case.

Respondent adopts the statement of the case as set forth in the brief of petitioners as substantially correct, with the exception that the letters referred to on pages eight and nine of petitioners' brief were an informal decision of the Interstate Commerce Commission, its number 74618. The letter of Mr. Eastman, Commissioner, to Mr. Chambers, Director of Traffic of the United States Railroad Administration, was referred to and incorporated as a part of that decision. Respondent, in the Court below, cited the informal decision of the Commission as an authority in its favor on the construction of the tariff.

There is but one question before this Court, and that is, did the State Courts of the State of Minnesota have jurisdiction of the subject matter of this action?

BRIEF.

I.

Petitioners have filed an exhaustive brief quoting from and analyzing many decisions bearing directly or indirectly upon this question. Therefore, respondent will shorten its brief as far as possible by omitting repetitions of quotations, which have been set forth in the brief of petitioners. Respondent wishes to emphasize that it *agrees entirely with every decision of this Court cited by petitioners;* agrees that the quotations from the cases cited by petitioners are correct and respondent is willing to adopt them in toto, but respondent further wishes to impress upon this Court *that it does not agree with the distinctions, inferences and conclusions drawn by petitioners* from these same cases. Respondent sees absolutely *no conflict* between any of the decisions of this Court bearing on this point and believes that the only *apparent* conflicts are due to the erroneous inferences and conclusions drawn from these cases in the brief of petitioners.

II.

The rule governing the question of jurisdiction here presented is well settled. It is simple and easy of application and if that rule is correctly stated and applied to each case, it will be found there is no conflict of the authorities and that the questions which must be submitted to the Commission before an action is brought in court and those on which an action may be commenced in a court of law, in the first instance, are clearly distinguished and defined. That rule, briefly stated, is as follows:

> *Where a shipper attacks a rate, charge or rule as unreasonable, discriminatory, prejudicial or*

preferential, there is an administrative question raised which must first be determined by the Commission, but where a shipper makes no such attack upon a rate, charge or rule, but merely contends that the rate or charge was not authorized by the duly published tariffs or that the rules are not applicable, or have been applied in an unlawful manner, then it is a question which it is proper for courts of law to determine in the first instance.

This same rule may be stated in several other ways, and perhaps some of these are shorter and more easily applied.

1. The Commission has original jurisdiction of charges involving an administrative question, but the courts have original jurisdiction of charges or rates, which are illegal per se.

All rates or charges prohibited by the Interstate Commerce Act are, of course, illegal, but there are certain rates or charges which become illegal only after they have been declared unreasonable, prejudicial or preferential, but there are other charges which violate or are in excess of a duly filed and published tariff. To make a charge in excess of such published tariff is illegal on its face. Although both classes of excessive charges are unlawful, the first class is not illegal until such charge is declared unreasonable, prejudicial or preferential by the Interstate Commerce Commission, for the reason that it requires the administrative ability and functions of that tribunal to so find. However, if a carrier arbitrarily makes a charge in excess of its legal and lawfully published tariffs, that charge is illegal and unlawful *per se*, for the reason that it is specifically prohibited by law. There is no administrative question involved, and for that reason it is within the jurisdiction of a court of law to require the carrier to refund such an overcharge without resort to the Commission in the first instance. There is nothing for the Commission to decide. It is only a

question of law and fact as to whether or not the carrier has charged more than the legal rate, as provided in its tariffs.

> 2. The Interstate Commerce Commission has exclusive original jurisdiction to determine the reasonableness of a rule or rate, but the courts have original jurisdiction to determine the construction and application to the facts.
>
> 3. The Commission has original jurisdiction to put in or take out a rate or rule, but the courts have original jurisdiction to construe or apply a rate or rule already published.
>
> 4. The Commission has original jurisdiction to determine administrative facts, but the courts have original jurisdiction to determine the meaning of words, tariffs or rules.
>
> 5. The Commission has original jurisdiction to formulate a rate or rule, but the courts have original jurisdiction to interpret and apply such rates or rules after their publication.

These are all another manner of stating the principle which governs the case in question. By the application of any of these rules of thumb to the cases of this Court, it will immediately appear that all the cases decided by this Court, as well as subordinate courts, will fall naturally into two classes, and there will be no conflict between the same.

III.

By applying the rule or rules above stated, the cases falling into the first class or the class in which the Commission has original jurisdiction and on which *petitioners* mainly rely, are as follows:

> *T. & P. Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S., 426;
>
> *B. & O. R. R.* v. *Pitcairn Coal Co.*, 215 U. S., 481;

Robinson v. *B. & O. R. R.*, 222 U. S., 506;
Mitchell Coal Co. v. *Penn. R. R.*, 230 U. S., 247;
Morrisdale Coal Co. v. *Penn. R. R.*, 230 U. S., 304;
T. & P. R. R. Co. v. *American Tie & Timber Co.*, 234 U. S., 138;
Penn. R. R. Co. v. *Clark Coal Co.*, 238 U. S., 456;
Loomis v. *Lehigh Valley R. R. Co.*, 240 U. S., 43.

IV.

The cases decided by this Court which fall under the second part of the rule, as above stated, over which courts of law have primary jurisdiction and on which *respondents* rely, are as follows:

Penn. R. R. Co. v. *Puritan Coal Co.*, 237 U. S., 121;
Eastern Ry. Co. v. *Littlefield*, 237 U. S., 140;
I. C. R. R. Co. v. *Mulberry Coal Co.*, 238 U. S., 275;
Penn. R. R. Co. v. *Sonman Coal Co.*, 242 U. S., 120;
Penn. R. R. Co. v. *Kittanning Co.*, 253 U. S., 319;
St. L., Iron Mountain & So. Ry. Co. v. *Hasty*, 255 U. S., 252;
Penn. R. R. Co. v. *Stineman*, 242 U. S.

V.

Some of the decisions of the State Courts and Subordinate Federal Courts which are direct authorities in favor of respondent and also fall within the second class are the following:

Reliance Elev. Co. v. *C. M. & St. P. Ry Co.*, 165 N. W. (Minn.), 867;
Gustafson, et al., v. *Mich. Cent. R. R. Co.*, 129 N. E., 516;
Wolverine Brass Works v. *So. Pac. Co.*, 153 N. W., 778;
Natl. Elev. Co. v. *C. M. & St. P. R. R. Co.*, 246 Fed., 588;
Francisconi v. *B. & O. R. R. Co.*, 274 Fed., 687;
Empire Refineries v. *Guaranty Trust Co.*, 271 Fed., 668;
Hite v. *Central R. R. of N. J.*, 171 Fed., 370;
Natl. Coal Co. v. *C. & N. W. R. R. Co.*, 211 Fed., 65;
Gimbel Bros. v. *Barrett*, 215 Fed., 1004;
C., B. & Q. R. R. Co. v. *Feintuch*, 191 Fed., 482;
Kansas City Southern R. R. Co. v. *Ponn*, 143 S. W., 577;
Hardaway v. *So. Ry. Co.*, 73 S. E., 1,020;
W. & A. R. Co. v. *White Provision Co.*, 82 S. E., 644;
So. Pac. Co. v. *Erye & Bruhn*, 143 Pac., 163;
St. L., S. F. & T. Ry. Co. v. *Roff Oil Co.*, 128 S. W., 1194;
Laning-Harris Coal Co. v. *St. L. & S. F. Ry. Co.*, 15 I. C. C., 37.

It is the contention of respondents that the case at bar falls clearly within the second provision of the rule and is governed by the last cases cited.

ARGUMENT.

I.

Petitioners in this case are asking for a further limitation of the clear and unmistakable wording of the Interstate Commerce Act.

Petitioners in their brief repeatedly refer to the case at bar as a limitation upon the case of *Texas & Pacific Railway Company* v. *American Tie & Timber Company* 234 U. S., 138), but what Petitioners are really asking for is not a limitation upon that case, but an *extension* of the doctrine of that case and a *revolutionary limitation* of not only the Interstate Commerce Act but the *Judicial Code* contained in the Constitution of the State of Minnesota, which is guaranteed by the Federal Government.

Section 9 of the Interstate Commerce Act provides in part as follows:

> "That any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act, may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any District or Circuit Court of the United States, of competent jurisdiction, but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt * * *."

In addition to the jurisdiction conferred on the Federal Courts by Section 9, just quoted, Section 22 of the Act makes the following sweeping provision.

> "And nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute but the provisions of this Act are in addition to such remedies."

There can be no question but that at the common law the State Courts of Minnesota would have had jurisdiction of the case at bar. The Interstate Commerce Act not only did not repeal any common law remedies, but expressly, in unequivocal language, reserved to the shipper all his common law remedies. That being the case, the only limitation which can be placed upon the shipper to sue a common carrier in a court of law must be implied and, it being implied, the implication overruling the express terms of the statute must be limited as far as possible, and with the greatest care.

After the passage of the Interstate Commerce Act and its several amendments, it was found necessary to make an implied restriction on Sections 9 and 22, above quoted, and this restriction was finally made by this Court in the case of *Texas & Pacific Railway Co.* v. *Abilene Oil Co.* (204 U. S., 426). This case is the authority and the basis for any and all restrictions or limitations subsequently laid down by this Court and others.

The *Abilene* case was an action brought before a court in the first instance to declare a properly filed and published rate unreasonable. The *Abilene* case prohibits primary or original jurisdiction of courts of law to declare in the first instance that an existing rate or rule is unreasonable and therefore void. This Court based its judgment upon the argument of uniformity of rates which, in the case at bar, is strenuously urged by Petitioners, and upon which Petitioners rely. And it was a necessary and proper limitation, but it is a limitation only upon the power of a court to declare a rate or rule unreasonable, preferential or prejudicial before the Interstate Commerce Commission has passed upon that proposition, for the reason that there is an administrative question involved. By the application of the rule before stated, the *Abilene* case falls naturally into the first class.

The following cases, relied upon by Petitioners to sustain their position, all fall directly within the limitation

laid down by the *Abilene* case, and do not in any way increase that limitation:

B. & O. R. R. v. *Pitcairn Coal Co.* (215 U. S., 481);
Robinson v. *B. & O. R. R.* (122 U. S., 506);
Mitchell Coal Co. v. *Penn. R. R. Co.* (230 U. S., 247);
Morrisdale Coal Co. v. *Penn. R. R. Co.* (230 U. S., 304);
Penn. R. R. Co. v. *Clark Coal Co.* (238 U. S., 456).

A glance at these cases just cited will show that they are all within the doctrine of the *Abilene* case, and in no way extend that doctrine. As has already been pointed out, the *Abilene* case was a direct attack upon a published rate, on the ground that it was unreasonable, and this Court properly held that this was an administrative question first to be determined by the Commission. In other words, the *Abilene* case falls within class one or the first part of the rule quoted in Section II of the brief.

The case of *B. & O. R. R.* v. *Pitcairn Coal Co.* was a direct attack upon a rule already published and filed, which the shipper claimed was discriminatory. Again it being an attack upon the rule itself, and not a mere question of the application or construction of the rule as published, there was an administrative question raised and under the holding of the *Abilene* case it was properly placed in class one. The case of *Morrisdale Coal Co.* v. *Penn. R. R. Co.* is identical, and the case of *Robinson* v. *B. & O. R. R.* is also identical, except that in that case there was an attack on a *rate* as discriminatory instead of a rule.

The case of *Penn. R. R. Co.* v. *Clark Coal Co.* is on all fours with the *Pitcairn* and *Morrisdale* cases, except that in the *Clark* case there had been an award by the Commission in the first instance, and the plaintiff attempted

to treble that award under a state statute. This case, without further discussion, is governed by Section 9 of the Act, in that the plaintiff had chosen his remedy and must abide by that decision.

In the case of *Mitchell Coal Co.* v. *Penn R. R. Co.* the plaintiff made an attack upon certain allowances made by the defendant to other shippers for services rendered to the defendant by those other shippers. In that case the carrier took the position that the allowances were proper and reasonable and had been established by long custom and practice. It is, of course, well recognized that a custom and practice not contrary to an express tariff provision is lawful, therefore, immediately the question arose as to whether or not the allowances made to other shippers were reasonable and non-discriminatory. This was a question for the commission to pass upon in the first instance, and the *Mitchell* case is in no way an extension of the rule laid down in the *Abilene* case.

Respondent reiterates that it believes that the principle in the *Abilene* case was a proper one for this Court to find and, inasmuch as all the cases just referred to coincide with the *Abilene* case, respondents believe that they are all correctly decided. However, they are merely authorities in support of the first part of the rule as stated by respondent in Section II of his brief, namely:

> "Where a shipper attacks a rate, charge or rule as unreasonable, discriminatory, prejudicial or preferential there is an administrative question raised which must first be determined by the Commission."

But the respondent in the case at bar has made no attack in any way whatsoever upon any rate, rule or charge as unreasonable, discriminatory or prejudicial, but merely claims that there was no tariff authority of any kind for the exaction of the charge for the recovery of which this action was brought. The case at bar therefore does not fall within the first class or the first part of

the rule above quoted, or is not governed or controlled in any way by the cases just referred to.

There has been by this Court but one *apparent* extension of the doctrine laid down in the *Abilene* case. This *apparent* extension of the *Abilene* case is made in the cases of *Texas & Pacific R. R. Co.* v. *American Tie & Timber Co.* (234 U. S., 138), and the case of *Loomis* v. *Lehigh Valley R. R.* (240 U. S., 43). The first of these cases is the one upon which petitioners place such reliance and contend that it controls the case at bar. The *Loomis* case is identical in principle with the *American Tie* case, and the two may be considered together.

It will be readily seen upon a reading of the *American Tie* case that it does not hold what petitioners claim, but in reality merely follows the *Abilene* case.

In the *American Tie* case the shipper contended that crossties should move as lumber under the lumber rate. There was in fact no rate named in any tariff to cover crossties. Therefore, the shipper was attempting to prove that crossties should take the lumber rate. It appeared, however, that there was a question as to whether or not crossties were lumber, but, moreover, a more serious question, should they take the same *rate* as did ordinary lumber? As a matter of fact, the shipper was asking the Court *to name or establish a rate on a commodity for which there was no rate in existence.* To establish or promulgate such a rate in the first instance would be calling upon the Court to use administrative powers conferred upon the Commission, for the reason that the Court must, in naming or establishing such a rate, pass upon the question as to whether or not the rate that it did name was reasonable and was not discriminatory or prejudicial. This case has caused confusion simply for the reason that the Court did not specifically state, as it did in the *Loomis* case:

> "In the last analysis the instant case presents a problem which directly concerns *rate making,* and is peculiarly administrative."

In the case of *Gimbel Bros.* v. *Barrett* (214 Fed., 1004), the distinction is well stated by the Court as follows:

> "The latest case on the subject to which we have been referred, that of *Texas, etc., R. Co.* v. *Tie Co.*, 234 U. S., 138 (34 Sup. Ct., 885), affords another illustration of the same distinction. There the complaint was the refusal of the railroad to transport ties in pursuance of an alleged purpose to limit their sale market. The objection to any action by the court was that no rate for ties had been filed by the carrier, and, in consequence, no charge could be made for such service. There was a rate for lumber, and the question was whether this applied to ties. The court held this question 'was one to be primarily determined by the commission' in the exercise of the powers conferred upon it by Congress because the real purpose to be accomplished was an administrative purpose."

The *Loomis* case is identical in principle with the *American Tie* case. In the *Loomis* case a shipper attempted to recover for material and labor used in the coopering of cars. This Court in that case properly found that there was no rule or rate *named in any tariff* which would allow a refund or recovery for this expense. If the courts allowed for this expense it would naturally follow that they would be interfering or changing the rate on a particular commodity, as it would be necessary for the carrier to raise its rate to cover this additional expense or to cover the furnishing of special equipment for this particular commodity. The Court was called upon to primarily fix or establish a rate, as it was in the *American Tie* case, and properly followed that case.

II.

Uniformity.

Petitioners rely primarily upon the *American Tie* case, but quite as strenuously argue the broad principle of uniformity of rates. Respondents admit that this is a broad principle and one that should be taken into consideration by this Court, and it was so taken into consideration and is the basis of the *Abilene* case, which this Court fully discussed as quoted in petitioner's brief (P. B., p. 27). But, as there pointed out, only in a case of *absolute necessity* should a Court limit the common law and the express wording of a statute by *implication*, and there is no such necessity in the case at bar.

The Court will note upon a careful analysis of every single case in which this question has arisen that the basis of the argument against the jurisdiction of the court at law has been this same uniformity of rates. In many of the decisions this argument appears, in the others a glance at the briefs will show that it has been strenuously advocated, particularly has it been urged in the cases considered by this Court which have been decided *adversely* to the petitioners. Therefore, this Court, having carefully considered the same, this respondent should not be obliged to argue at length the question of uniformity of rates.

However, respondent deems it advisable to call to the attention of this Court a few of the reasons which clearly demonstrate that a primary finding by a court of law in the case at bar will not in any way interfere with any rate structure or uniformity of rates.

The Court's attention is called to the fact that the only possible ground for the decision in the *Abilene* case is this same argument for uniformity of rates, and insofar as the *Abilene* case went, respondent agrees that it was a necessary though possibly drastic limitation upon

the express wording of the Interstate Commerce Act and the Constitutions of the several States. The Court points this out clearly in the *Abilene* case, but there is no reason for extending indefinitely limitations based upon this argument.

For all the voluminous argument of counsel for uniformity of rates in making objections to the jurisdiction of courts of law in such cases as the one under consideration; since the passage of the Act there never has been created any non-uniformity of rates. There is only one instance in all the cases decided by all the courts of the United States in which the same tariff or the same rate has come up for consideration by two courts. These cases are *National Elevator Co.* v. *C., M. & St. P. R. R. Co.* (246 Fed., 588), decided by the Circuit Court of Appeals for the Eighth Circuit, and the case of *Reliance Elevator Co.* v. *C., M. & St. P. R. R. Co.* (165 N. W., 867), decided by the Supreme Court of the State of Minnesota, which last case is quoted at length in petitioner's brief and upon the authority of which the same Court decided the case at bar. In those two cases the defendant and tariff were the same and the Supreme Court of the State of Minnesota did not hesitate, even without discussion, to follow the Circuit Court. *In other words, the phantom of non-uniformity of rates raised and argued so strenuously in this case has never, since the passage of the Interstate Commerce Act, become a reality.*

But viewing it from a practical standpoint, it would be impossible to establish in a case such as this any actual difference in rates where the attack is made upon an actual published tariff or charge. Where the attack is made on a rule or charge as unreasonable, prejudicial or discriminatory, it may readily be seen that if this question were left to local courts that those courts, swayed by bias or over-enthusiasm for local communities, could give an unreasonable, prejudicial and discriminatory advantage to their own communities to the detriment of other States and a burden on Interstate Com-

merce. That is, if allowed to, a court in Minnesota could establish a rate between Minneapolis and Chicago so low that it would destroy the competing markets of Omaha and Kansas City. It would then follow that the courts of Nebraska and Missouri would retaliate by finding the rates from Omaha and Kansas City to Chicago unreasonable, on the perfectly sound ground of the comparison with the rates from Minneapolis to Chicago, hence absolutely destroying the uniformity of rates and creating an unbearable burden upon other localities engaged in Interstate Commerce. This is the reason for the *Abilene* case and the other cases which follow in its footsteps, and this is the reason which makes the *Abilene* case, though somewhat violent to express statutes, still absolutely sound in principle.

But in the case at bar the petitioners arbitrarily extorted from the respondents and a large number of shippers in the same territory, a charge of $5 a car without performing any service for the same. This is an individual overcharge against specific and individual shippers which has no bearing whatsoever upon any uniformity of rates or rate structure.

Even presuming that the Supreme Court of Minnesota is wrong in its interpretation and application of the tariff in question, in what way has the uniformity of rates been destroyed? The petitioners may be sued in the State of Minnesota by any shipper or citizen of the United States or foreign countries, and the courts of that State will in conformity with the decision in this case, order the petitioners to make the identical refund which it has ordered to respondents. Is there any interference with the uniformity of rates under these circumstances? This is a tariff covering not only the entire line of petitioner, the Great Northern Railway Company, but at that time the entire western territory through the Director General of Railroads and the United States Railroad Administration. Every railroad hauling grain in that territory was forced by the order of the Interstate Commerce Commis-

sion to publish the suspension order here under consideration. The tariffs were identical, and Commissioner Eastman advised Mr. Chambers, Director of Traffic of the United States R. R. Administration during this particular time, that the interpretation of this suspension order contended for by respondents was correct. There were only three of the ten systems entering the city of Minneapolis which exacted this illegal charge (Tr., 42). Respondents are forcing a *uniformity* of rates, not an interference with them.

By the decision rendered by the Supreme Court of Minnesota rates were made uniform, and so it must be in every single case of an interpretation of the tariff for the reason that any member of the shipping public may bring his action in the State of Minnesota and obtain the identical refund, against the identical defendant, under the identical tariff, under the identical decision here appealed from. Nor can there be a case imagined where the interpretation of a tariff is involved that this same result cannot and will not be achieved.

It therefore appears plainly that this Court has time and time again considered the advisability of a further limitation upon the express wording of the Interstate Commerce Act, based upon this same argument of uniformity and has continuously denied the same except in so far as the *Abilene* case goes. Respondent merely points out the few points above to show that it is an impossibility in case a court in the first instance interprets the meaning of a published tariff to in any way interfere with the uniformity of rates either as to localities or as to individual shippers.

III.

The case at bar is clearly sustained by the cases cited in the brief and is a case over which the courts have primary jurisdiction.

It is the contention of respondent that the State courts of Minnesota clearly had jurisdiction to decide the question in controversy, and respondent is supported in that contention by the authorities before cited. It is true that petitioners attempt to distinguish and draw inferences from these cases which respondent does not believe exist, and respondent is willing to base his case entirely upon the wording of the Court.

As before pointed out, the *Abilene* case is a limitation upon the common law and the clear wording of the Interstate Commerce Act. The first case in this court clearly refusing to extend this limitation is the case of *Penn. R. R. Co.* v. *Puritan Coal Co.* (237 U. S., 121). The holding of this case is clearly shown by the following quotation:

> "There are several decisions, already cited, which hold that suits against railroads for unjust discrimination in Interstate Commerce can only be brought in the Federal Courts. But it must be borne in mind that there are two forms of discrimination—one in the rule and the other in the manner of its enforcement; one in promulgating a discriminatory rule, the other in the unfair enforcement of a reasonable rule.
>
> But if the carrier's rule, fair on its face, has been unequally applied and the suit is for damages, occasioned by its violation or discriminatory enforcement, there is no administrative question involved, the courts being called on to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage. Such suits, though against an Interstate Carrier for damages arising in Interstate Commerce, may be prosecuted either in the State or Federal Courts. * * * In the distribution of cars to coal compa-

nies, it might be necessary to determine whether account should be taken of system cars, foreign cars, private cars and the company's own coal cars. In many cases the determination of such an issue would call for the exercise of the regulating function of the Commission. That was true in *Morrisdale Coal Co.* v. *Pennsylvania Railroad*, 230 U. S., 304, 312-314. There the plaintiff admitted that it had received all the cars to which it was entitled under the carrier's rule, but it insisted that the rule itself was unreasonable and unjustly discriminatory, since it took no account of private and foreign cars controlled by the mining company. The reasonableness of the rule was a matter for the Commission.

The present suit, however, is not of that nature. It is not based on the ground that the Pennsylvania Railroad's rule to distribute in case of car shortage on the basis of mine capacity, was unfair, unreasonable, discriminatory, or preferential. But as shown above, the plaintiff alleged it was damaged by reason of the carrier's failure to furnish it with cars to which it was entitled. In support of that issue of fact, the plaintiff relied on the carrier's own rule as evidence. That rule, and the carrier's distribution sheets, showed the number of cars to which the plaintiff, the Berwind White Company and other coal companies in the district, were each entitled. The evidence further showed that the plaintiff did not receive that number of cars to which by rule it was thus entitled. So that on the trial there was no administrative question as to the reasonableness of the rule, but only a claim for damages occasioned by its violation in failing to furnish cars (*Penna. R. R. Co.* v. *International Coal Co.*, 230 U. S., 197). The State and Federal Courts had concurrent jurisdiction of such claims against an Interstate Carrier without a preliminary finding by the Commission."

The contention of petitioners that the *Puritan* case was decided purely on the ground of the pleadings is without merit, as the language above quoted shows. If the facts were admitted, why take evidence and make findings?

The *Puritan* case was immediately followed by the *Eastern Ry. Co.* v. *Littlefield* (237 U. S., 140). This case is on all fours with the *Puritan* case, and is a direct authority in support of that case, and is a refusal to further extend the doctrine of the *Abilene* case.

Again these two cases are followed and cited by the case of *Ill. Cent. R. R. Co.* v. *Mulberry Coal Co.* (238 U. S., 275), and even petitioners are unable to explain the holding of this case or to reconcile it with their contention. Their only explanation of the case is as follows:

> "In fact the petitioners are again forced to the conclusion that the Mulberry decision can only be accounted for by the peculiar nature of the pleadings in that case and by the failure of this court to recognize in that case what it has already recognized in the Eastern Ry. Company, that the *Puritan* case itself was controlled by the nature of its own pleadings" (P. B., 63).

Certainly the case of *Penn. R. R. Co.* v. *Sonman Company* (242 U. S., 120), is squarely in point and the ruling authority governing the case at bar, which is shown by the following quotation from that case:

> "That the act does not supersede the jurisdiction of state courts in any case, new or old, where the decision does not involve the determination of matters calling for the exercise of the administrative power and discretion of the Interstate Commerce Commission, or relate to a subject as to which the jurisdiction of the Federal courts is otherwise made exclusive, *ibid.*, 130; that claims for damages arising out of the application, in Interstate Commerce, of rules for distributing cars in times of shortage, call for the exercise of the administrative authority of the Commission where the rule is assailed as unjustly discriminatory, but where the assault is not against the rule but against its unequal and discriminatory application, no administrative question is presented and the claim may be prosecuted in either a Federal or a State Court without any precedent action by the Com-

> mission, *ibid.*, 131-132; and that, if no administrative question be involved, as well may be the case, a claim for damage for failing upon reasonable request to furnish to a shipper in Interstate Commerce a sufficient number of cars to satisfy his needs, may be enforced in either a Federal or a State Court without any preliminary finding by the Commission, and this whether the carrier's default was a violation of its common law duty existing prior to the Hepburn Act of 1906, or of the duty prescribed by that Act, *ibid.*, 132-135; *Eastern Ry. Co.* v. *Littlefield*, 237 U. S., 140, 143; *Illinois Central R. R. Co.* v. *Mulberry Hill Coal Co.*, 238 U. S., 275, 283; *Pennsylvania R. R. Co.* v. *Clark Coal Co.*, 238 U. S., 456, 472."

Even petitioners at page 64 of their brief make the following admission:

> "The case of the *Penn. R. R.* v. *Sonman Co.*, 242 U. S., 120, the petitioners must confess they are unable either to distinguish or reconcile with any other decision of this court."

What petitioners really mean to say is that they are unable to distinguish the *Sonman* case from the case here under consideration. The *Sonman* case is an absolute authority and in itself without further discussion is sufficient to sustain the jurisdiction of the courts of the State of Minnesota in the case at bar. In the *Sonman* case the action was brought to determine the application of a car distribution rule, while the case at bar is based upon the interpretation and application of a re-consigning rule. In the *Sonman* case the plaintiff recovered for failure to observe this rule. In the case at bar the plaintiff and respondent is merely asking that petitioners refund charges unlawfully and illegally extorted and collected in excess of the duly filed and published rule governing re-consigning.

Following this is the case of *Penn. R. R. Co.* v. *Kittanning Co.* (253 U. S., 319), which is also on all fours with

the case at bar and controls the same, the only difference being that in that case the carrier was plaintiff instead of the shipper. To make a distinction in the rule on this basis is a logical impossibility.

Follows the case of *St. L., Iron. & So. R. R.* v. *Hasty,* 255 U. S., 252. It is true that this case involved the construction of state rates instead of interstate; but it was decided under an act similar to the Interstate Commerce Act, and if the principle of uniformity of rates applies to state rates, the same principle is applicable to interstate rates, the latter simply being on a larger scale and under the control of the Federal Government rather than the State Government.

The cases of *Wight* v. *U. S.* (167 U. S., 512), and *Penn R. R. Co.* v. *International Coal Co.* (230 U. S., 134), are cases involving rebating. They are interesting in that they support the contention of respondent that a court of law has original jurisdiction of any case against a carrier which is unlawful on its face or illegal *per se.* In both these cases, unlawful rebates were given to other shippers, and this Court held that it had jurisdiction to determine the damages suffered by plaintiffs due to rebating. They are both clearly distinguishable from the *Mitchell* case, because these two cases are straight rebate cases, while the *Mitchell* case involved the payment for services and there was in that case the question as to whether or not the payment for the services was a reasonable one.

The above cited cases are the ones decided by this Court upon which respondent mainly relies, as all these decisions clearly lay down the rule stated in the brief, and the proper application of that rule to the case at bar must necessarily decide the same in respondent's favor.

Before passing to the consideration of the cases decided by state courts and Subordinate Federal courts, respondent calls the attention of this Court to the Interstate Commerce Commission's own opinion on this precise point, and it will be noted that the Commission not only

specifically holds that a court of law has jurisdiction in the first instance in the case at bar, but further than that expresses doubt as to whether the Commission has any jurisdiction at all. But finally holds that it has such jurisdiction upon the ground that a charge in excess of the duly filed and published tariffs is an unreasonable charge, thereby giving the Commission jurisdiction. This position of the Commission is best expressed in the case of *Laning-Harris Coal Co.* v. *St. L. & S. F. R. R. Co.*, 15 I. C. C., 37, from which we quote as follows:

> "Whether the Commission has authority to award damages in a case where a carrier collects a greater sum on an interstate shipment than is fixed by its published tariffs, or whether the shipper must seek his remedy in the courts, presents a question somewhat more difficult. But upon consideration of the various provisions of the Act, it is believed that the question should be resolved in favor of the Commission's authority to make such an order. The Commission is authorized to award reparation to any person or persons found to be damaged by any common carrier subject to the provisions of the act, for a violation thereof. One of the leading prohibitions of the act is that against the exaction of an unreasonable rate, and it is well settled that the Commission has authority to award reparation in case of the exaction of an unreasonable rate. As against the carrier, its published tariff rate is conclusive of the fact that any higher rate is unreasonable. It seems fairly certain that in cases of the exaction of a rate higher than the published tariff, the shipper may bring his suit in court in the first instance, but the act also appears to give the commission and the courts concurrent jurisdiction in this respect. An order will therefore be entered requiring defendant to pay to complainant the amount of the admitted overcharge. In arriving at this conclusion we are not unmindful of the fact that to enforce our order complainant may have to go into a court which has authority to allow the set-off alleged by the railroad company, and this may entirely defeat recovery by

complainant under the order, if the set-off is held to be a good defense. But such a difficulty seems unavoidable in cases of this kind, where the complainant elects to come before the Commission in preference to suing before a court in the first instance."

All the cases which are cited in Section V of respondent's brief, follow in a general way, the quotations above, and it would seem very peculiar if four Federal Circuit Courts, several Federal District Courts and numerous State Courts should all misinterpret the decisions of this Court. It would appear more probable that the conclusions, inferences and distinctions drawn by petitioners in their brief were erroneous.

In the case at bar respondents are merely seeking to recover a charge collected in excess of petitioners' duly published tariff. If a court has not jurisdiction to determine this question both carriers and shippers could be easily placed in an absurd position. A carrier could make any extortionate charge in excess of its tariff even if the charge was made by error. Then if petitioners' position is correct, all that is necessary when the shipper brings an action to recover this amount is for the carrier to file a general denial, as they did in the case at bar (Tr., p. 3).

In the case at bar, although a general denial was filed to all the allegations in the complaint, there was absolutely no attempt to disprove any of the material facts of plaintiff's case with the exception of the tariff construction. Petitioners naïvely suggest that in such a case where there was no question of doubt that the court would have jurisdiction, but whom would determine whether or not there was a question of doubt. Necessarily, the court before whom the case came would have to determine that question and would have to determine the degrees of doubt. The only other test would be whether or not the defendant filed a general denial. Is it possible that a court of law in such a case as this can be ousted of its Constitutional Jurisdiction by the mere filing of a general denial?

Turn the case around and suppose that respondent, as many shippers do, had refused to pay this illegal charge. How would the carrier collect the same? Petitioners suggest that after the action was commenced that the trial be stopped in its midst and the question referred to the Interstate Commerce Commission for decision. Respondent admits that it is unaware of any statute, rule or practice, admitting of any such procedure. The other suggestion of petitioners to get around this difficulty is that the Commission would make an *ex parte* investigation and determine the matter. The only *ex parte* investigations which the Commission has so far made are those involving matters of nation-wide importance, such as the famous *Ex Parte 74*, which made a general increase of rates throughout the United States. Since its existence the Commission has made less than one hundred of these *ex parte* investigations, and respondents do not believe that they will start making *ex parte* investigations in matters involving $80.

The Interstate Commerce Commission has no jurisdiction or power to award damages against a shipper in favor of a carrier or even to entertain a counterclaim of a carrier in an action by a shipper.

Laning-Harris Coal & Grain Co. v. *R. R. Co.*,
15 I. C. C.

If the petitioners' contention is correct, it could not sue this shipper for an undercharge before the Interstate Commerce Commission, nor could it bring its action in a court in the first instance until the Interstate Commerce Commission had construed the tariff. The Interstate Commerce Commission would have no jurisdiction to consider this tariff as against the shipper. There could be nothing involved before the commission but a moot case in which this shipper could not be compelled to

appear and a finding by the Interstate Commerce Commission, even if it would make such a finding, could not in any way be binding on this shipper, because the shipper had not been a party to the action. So that if the carrier's contention as to jurisdiction is correct, a carrier could never collect an undercharge where the shipper claimed a different construction of the tariff.

The respondent realizes that there is ample authority and decisions of this court on which a decision in the case at bar may be based. Respondent, however, has cited a considerable number of cases from State Courts and Subordinate Courts for the mere purpose of demonstrating that all these Subordinate Courts uniformly hold that they have jurisdiction of suits such as the case at bar and for the further reason that in these cases the decisions of this court are quite fully discussed and digested and in each case the Subordinate Court, after a review of the decision of this court, has reached the conclusion for which respondent here contends. A good illustration of this is the case of *Reliance Elevator Company* v. *C. M. & St. P. Ry. Co.*, 165 N. W. (Minn.), 867, which is quoted at length in petitioners' brief at pages 17 to 21, inclusive.

It is further illustrated by the following quotation from the case of *Gimbel Bros.* v. *Barrett* (215 Fed., 1004):

> "The question thus ruled to be within the province of the commission to primariy determine is a different question from that raised by the allegation that a carrier has charged more than or otherwise departed from the published rate. This may involve the meaning of the tariff in order to deetermine the fact of the alleged departure. To hold that the court cannot determine the fact of whether the published rate or more or less than the published rate has been collected in a given case is to take from the courts the jurisdiction committed to them by Congress. Nor is this result changed by the fact of whether the rate be one

> which is fixed by an act of Congress, by a tariff or schedule of rates fixed by being filed by the carrier, or by a ruling by the commission. In any case, the fact of departure from it must be a fact within the province of the court to find, or it can never proceed to render judgment in any case. See also *Louisville, etc., R. Co.* v. *Brewing Co.*, 172 Fed., 117 (96 C. C. A. 322, 40 L. R. A. (N. S.) 789; *St. Louis, etc., R. Co.* v. *Oil & Cotton Co.* (Tex. Civ App.), 128 S. W. 1194; *Western, etc., R. Co.* v. *Provision Co.*, 142 Ga., 246 (82 S. E. 644). We think the court had jurisdiction to determine whether there had been an overcharge under the tariffs as fixed and published."

Another vital objection to petitioners' position is that the Interstate Commerce Commission was not intended to consider such cases as this and that body has not machinery necessary to handle the large volume of straight over and undercharge cases. This court is familiar with the practice and procedure of the commission and it certainly was not the intention to compel shippers to come from the Pacific Coast to Washington to argue matters involving $80. If the Act intended any such procedure it would have provided a means for hearing cases such as is provided by the Federal Judicial Code.

A tariff is merely a contract between the shipper and carrier and is in all respects determined by a court of law under the same rules by which a contract is interpreted. This fact petitioners entirely lose sight of.

Respondent submits to this court that the ordinary judge or court is far more able to interpret and apply the wording of a particular tariff than is the Commission. The suggestion is made by petitioners that this is an interpretation of an Interstate Commerce Commission order. Respondents are willing to submit that courts and judges with their special and peculiar training are far more able to determine the meaning of words or language

than is this same body called the Interstate Commerce Commission. The particular order under consideration was promulgated by the Interstate Commerce Commission and if they cannot draw an order which is not ambiguous, respondent sees no reason why it should not apply to the courts for an interpretation of that order.

As far as circular 18-A is concerned, respondent only remarks that if petitioners had followed directions stated in that circular, this case would not now be before this court for the reason that the said circular provides in substance that the language of a tariff shall be clear to the man of ordinary intelligence.

Conclusion.

It must now appear to this court that the rule governing this question of jurisdiction as stated in the brief of respondent is correct, which rule is as follows:

> *"Where a shipper attacks a rate, charge or rule as unreasonable, discriminatory, prejudicial or preferential, there is an administrative question raised which must first be determined by the Commission, but where a shipper makes no such attack upon a rate, charge or rule, but merely contends that the rate or charge was not authorized by the duly published tariffs or that the rules are not applicable, or have been applied in an unlawful manner, then it is a question which it is proper for courts of law to determine in the first instance."*

By the application of this rule to every case cited it will be found that there is no conflict in the authorities. The cases cited and relied upon by petitioners fall naturally and properly into the first class or first portion of this rule and the cases cited by respondent in support of its contention fall naturally into the second class or last part of this rule.

The case at bar is simply an attempt by respondent to recover from petitioners a charge in excess of petitioners' duly published tariff. It therefore is clearly within the second class of cases and is covered by the latter part of the rule. Therefore, it follows that the State Courts of Minnesota have jurisdiction of this case and the decision of the Supreme Court of the State of Minnesota should be affirmed.

Respectfully submitted,

HAROLD G. SIMPSON,
Attorney for Respondents.

WASHINGTON, D. C., April , 1922.

No. 686 202

Supreme Court of the United States.

OCTOBER TERM, 1920.

GREAT NORTHERN RAILWAY COMPANY AND JOHN BARTON PAYNE, Director General of Railroads,
Petitioners,

vs.

MERCHANTS ELEVATOR COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA AND BRIEF IN SUPPORT OF SAME.

JOHN F. FINERTY,
F. G. DORETY,
Attorneys for Petitioners.

Supreme Court of the United States.

OCTOBER TERM, 1920.

GREAT NORTHERN RAILWAY COMPANY AND JOHN BARTON PAYNE, Director General of Railroads,
Petitioners,

vs.

MERCHANTS ELEVATOR COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

To the Honorable Supreme Court of the United States:

The petition of the Great Northern Railway Company and of John Barton Payne, Director General of Railroads respectfully shows to this honorable court:

The purpose of this petition is to ask the court to determine conflicting constructions of various

state and lower federal courts, and to resolve disputes which have arisen, as to the true intent and effect of the decision of this court in the case of the American Tie Company vs. Texas & Pacific Railway Co., 234 U. S. 138, and to determine whether, and to what extent, a state court has jurisdiction to adjudicate a disputed question of railway tariff construction. Since that decision, state and lower federal courts have come to diametrically opposite conclusions, both purporting to follow the authority of that case, and carriers have been at a loss as to how far they might properly comply with the judgments of lower courts (sometimes differing upon the same question of construction) requiring the carrier to place one construction or another upon its tariffs.

The Merchants Elevator Company brought an action against these petitioners in the Municipal Court of the City of Minneapolis to compel a refund of charges collected by the petitioners amounting to $5.00 per car for reconsigning or diverting cars of grain from their original billed destination to other points.

The governing tariff admittedly provided for such a reconsigning charge on traffic in general, but provided that such charge should not apply to "grain held for inspection or disposition orders incident thereto at billed destination or at point intermediate thereto."

In this case the billed destination was Willmar, Minnesota. The grain was inspected there but or-

ders were not furnished for disposition at Willmar or at any intermediate point. On the contrary, the cars were reconsigned to another city and the reconsigning charge was accordingly assessed and collected.

The plaintiff claimed that the phrase "at billed destination" should be read as though it occurred immediately after the word "inspection" and as modifying it, and that as the inspection was at billed destination the reconsignment should be free. Defendants claimed that the phrase "disposition at billed destination" should be read together as referring to orders for switching the cars to some mills or industries at Willmar, and that where the cars were reconsigned to other cities, the usual reconsignment charge should apply on grain as well as on other commodities. The defendants offered evidence to show that this construction not only accorded with gramatical rules but was more consistent with the history of the tariff and with other provisions therein.

As soon as it appeared upon the trial that the case called for an adjudication of a bona fide dispute as to tariff construction, the defendants moved to dismiss the action for want of jurisdiction, claiming and specially setting up under the terms of the Interstate Commerce Act of the United States immunity from the jurisdiction of the state court and the right and privilege of having the issues determined in the first instance by the Interstate Commerce Commission. The decision was against such right, privilege and immunity. The defendants'

motion was denied and the court rendered judgment in favor of the plaintiff upon the merits. The decision was affirmed by the Supreme Court of the State of Minnesota, by decision rendered December 3, 1920, in the case of Merchants Elevator Company, Respondent, vs. Great Northern Railway Company and the United States Railroad Administration, Walker D. Hines, Director General of Railroads, Appellants, Docket No. 21910 in said court. The petitioner John Barton Payne is the successor in office of the said Walker D. Hines.

The amount involved in this particular suit is only $80.00, but some $15,000 worth of exactly similar claims are now pending against the defendants and will be determined by the action of the court in this case. However, it is the much larger and more extensive question of the jurisdiction of the court to award judgment in an action of this character that your petitioners desire to present to this court.

Your petitioners aver that the said Supreme Court of the State of Minnesota, as well as the Municipal Court of the City of Minneapolis, erred in denying your petitioners' motion to dismiss said action for want of jurisdiction to enter judgment upon the merits of said action; that each of said courts erred in entering judgment requiring your petitioners to refund to the Merchants Elevator Company moneys lawfully collected for carrier service according to the terms of your petitioners lawfully published tariffs; that the payment of said judgment will result in an unlawful discrimina-

tion in favor of said Merchants Elevator Company and against other shippers who have paid the same charges; and that said decision is contrary to the terms of the Interstate Commerce Act of the United States and to the decision of your honorable court in the case of American Tie Company vs. Texas & Pacific Railway Company supra.

Your petitioners have herein no right of appeal to or writ of error from this honorable court. Your petitioners present herewith as a part of this petition a brief showing more fully their view upon the question involved and a certified copy of the entire transcript of record in the said case, including the proceedings in the said Supreme Court of the State of Minnesota.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this court directed to the Supreme Court of the State of Minnesota, commanding said court to certify and send to this court on a day certain, to be therein designated, a full and complete transcript of the record and all proceedings of the said Supreme Court of the State of Minnesota, and of the Municipal Court of the City of Minneapolis in this case, to the end that said cause may be reviewed and determined by this court, as provided by law, and that your petitioners may have such other and further relief or remedy in the premises as to this court may seem appropriate, and, that the said judgment of the said Supreme Court of

the State of Minnesota may be reversed by this honorable court.

Respectfully submitted,

JOHN F. FINERTY,
Attorney for John Barton Payne,
Director General of Railroads.

F. G. DORETY,
Attorney for Great Northern
Railway Company.

Supreme Court of the United States.

OCTOBER TERM, 1920.

GREAT NORTHERN RAILWAY COMPANY AND JOHN BARTON PAYNE, Director General of Railroads,
Petitioners,

vs.

MERCHANTS ELEVATOR COMPANY,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The decision of the court below is contrary to the spirit and reasoning of this court in the case of Texas & Pacific Railway Co. vs. Abilene Oil Co., 204 U. S. 26, and in Loomis vs. Lehigh Valley R. R. 240 U. S. 43. It is contrary to the letter of the decision in the American Tie Co. vs. Texas & Pacific Railway Co. 234 U. S. 138. We venture to affirm that either the decision of the state court is wrong or else the decision and language in the American Tie Company case is misleading and should be reversed or explained.

In the American Tie Company case, the Railway Company had a published tariff rate on lumber. The plaintiff tendered to it for shipment a carload of railway ties which the defendant refused to receive upon the ground that it had no tariff rate applicable. The only question of issue between the parties was as to the meaning of the word "lumber." We venture to say that there is no dictionary definition of the word "lumber" which would not include sawed timbers eight feet long and seven by nine inches in diameter to be used for supporting railway rails. Nevertheless, the defendant contended that the word "lumber" should be strictly construed, and should not be applied to cover such a distinct and specific commodity as a railway tie. If the issue as to the construction to be placed upon this word had not been involved, the jurisdiction of the court would not and could not have been questioned. It was questioned, and denied by this court solely upon the ground that this question of construction of the tariff was involved.

The Tie Company contended that while in doubtful cases, the necessity of uniformity and the danger of diversity and conflict might require previous action by the Interstate Commerce Commission in order to prevent one rule in one jurisdiction and another in another, still in the case before the court this rule should not be applied because it was so plain that the word "lumber" as used in the tariff should include cross-ties, and that, therefore, there

was no reason to proceed primarily before the Commission. This court said on page 147:

> "We need not pause to point out the *palpable error of law* which the proposition involves since on the face of the record it is apparent that the assumption of fact upon which it rests is absolutely without foundation." (Italics ours.)

The legal proposition which was being advanced was that where the question of construction was very simple and clear no previous action by the Commission should be required. The court refers to this as a "palpable error of law."

This decision was entirely in accord with the spirit and reasoning of the Abilene Oil Company case and the Loomis case supra. The following language from the Loomis case is particularly applicable in the present case:

> " * * * the preservation of uniformity and prevention of discrimination render essential some appropriate ruling by the Interstate Commerce Commission before it may be submitted to a court. See Penna. R. R. v. Puritan Coal Co., supra, pp. 128, 129; Penna. R. R. v. Clark Coal Co., supra, pp. 469, 470.
>
> If in respect of interstate business the courts of New York may determine, as original matters, rate-making problems, those in other states have like jurisdiction. The uncertainty and confusion which would necessarily result, is manifest. Ample authority has been given the Commission, in circumstances like those here shown, to administer proper relief, and in connection therewith to approve some gen-

> eral rule of action. In so doing it would effectuate the great purpose for which the statute was enacted."

In the present case, about the strongest argument that can be made against the imposition of the reconsigning charge is that the construction is doubtful, that reasonable minds might differ and that, therefore, the construction should be against the Railway Company. If it be conceded that the tariff is doubtful, and that reasonable minds might differ, it follows that shippers in one jurisdiction may be held subject to pay a $5.00 reconsigning charge on grain, while shippers in another jurisdiction may be freed from this charge. In other words, all of the evils of lack of uniformity and discrimination pointed out in the Abilene Oil case and the Loomis case would exist if the decision of the state court were to be sustained in the present action.

In Cheney vs. Boston & Maine R. R. 116 N. E. 411, at 412, the court said:

> "At the argument in this court the defendant for the first time took objection to the jurisdiction of the court on the ground that the construction of the defendant's tariff on interstate commerce filed with the Interstate Commerce Commission was a matter of which no state court had jurisdiction until the true construction of it had been passed upon by the Interstate Commerce Commission."

In Poor vs. Western Union Telegraph Company, 196 S. W. 28, at 31 the court said referring to a tariff stipulation:

> "Nor is the question of the reasonableness or of the real purpose and effect of such a limitation open to our consideration, since that is a matter for the Interstate Commerce Commission to pass upon."

On the other hand, the Circuit Court of Appeals for the Fifth Circuit in the case of National Elevator Co. vs. C. M. & St. P. R. R. Co., 246 Fed. 588, and the Supreme ourt of the State of Minnesota in a previous decision of Reliance Elevator Co. vs. C. M. & St. P. R. R. Co., 139 Minn. 69, have construed the American Tie Company case as having some other meaning than that which to us, at least, seems to be apparent upon its face. These courts and some other lower courts have sustained the jurisdiction of the state courts and the lower federal courts to resolve a bona fide dispute of tariff construction without previous action by the Commission. Apparently without intending any disrespect to or departure from the rule of this court in the American Tie Company case, they have adopted a rule which seems to be diametrically opposed to it. In Massachusetts and Texas at least, and presumably before this forum, an action of the character of this one would have been dismissed for want of jurisdiction. In Minnesota and perhaps some other states, the courts apparently intend to maintain their jurisdiction and to enforce what must necessarily be their varying and conflicting views as to the charges which shippers must pay for various services. We submit that if the Supreme Court is correct in its view, the carriers

should not be embarrassed by the apparently contrary language and decision of the American Tie Company case. If the American Tie Company case, as understood by us, is the law, state courts and the lower Federal courts should plainly be told that the construction which they have placed upon it is erroneous. We believe that it is of the utmost importance that a writ of certiorari be granted, to the end that what still seems to be a disputed and perplexing question may be determined once and for all. We believe that that uniformity in the treatment of shippers and in the charges assessed against them, which has been striven for by the framers of the Interstate Commerce Act, and which has been so carefully guarded by this court in its decisions cited above, is imperilled by the decision of the Supreme Court of Minnesota, and invoke the action of this court for the further protection of that principle.

Respectfully submitted,

JOHN F. FINERTY,
F. G. DORETY,
Attorneys for Petitioners.

Timber Co., 234 U. S. 138; *Loomis* v. *Lehigh Valley R. R. Co.*, 240 U. S. 43, and other cases, distinguished.
147 Minn. 251, affirmed.

CERTIORARI to a judgment of the Supreme Court of Minnesota affirming a judgment for the plaintiff in a suit by the present respondent to recover overcharges from the petitioner Railway Company.

Mr. John F. Finerty, with whom *Mr. F. G. Dorety* was on the brief, for petitioners.

The decision below, in holding that a disputed question of construction of an interstate tariff is within the jurisdiction of a court and does not require resort in the first instance to the Interstate Commerce Commission, not only directly contravenes the decision of this court in *Texas & Pacific Ry. Co.* v. *American Tie & Timber Co.*, 234 U. S. 138, but is in contravention of, or inconsistent with, the following decisions of this court: *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Baltimore & Ohio R. R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481; *Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific Ry. Co.*, 218 U. S. 88; *Robinson* v. *Baltimore & Ohio R. R. Co.*, 222 U. S. 506; *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541; *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88; *United States* v. *Pacific & Arctic Ry. & Nav. Co.*, 228 U. S. 87; *Mitchell Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 247; *Morrisdale Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 304; *Boston & Maine R. R.* v. *Hooker*, 233 U. S. 97; *Phillips Co.* v. *Grand Trunk Western Ry. Co.*, 236 U. S. 662; *Pennsylvania R. R. Co.* v. *Clark Coal Co.*, 238 U. S. 456; *Loomis* v. *Lehigh Valley R. R. Co.*, 240 U. S. 43; *Louisville & Nashville R. R. Co.* v. *Ohio Valley Tie Co.*, 242 U. S. 288; *Northern Pacific Ry. Co.* v. *Solum*, 247 U. S. 477; *Director General* v. *Viscose Co.*, 254 U. S. 498; and *Minnesota Rate Cases*, 230 U. S. 352.

Nor can the decision of the court below be justified under the decisions of this court in which, under the peculiar circumstances of the respective cases, this court has sustained the jurisdiction of a court over questions arising under the Interstate Commerce Act of a character which this court has generally recognized to be primarily within the jurisdiction of the Interstate Commerce Commission. *Wight* v. *United States,* 167 U. S. 512; *Southern Ry. Co.* v. *Tift,* 206 U. S. 428; *Interstate Commerce Commission* v. *Illinois Central R. R. Co.,* 215 U. S. 452; *Louisville & Nashville R. R. Co.* v. *Cook Brewing Co.,* 223 U. S. 70; *Galveston, H. & S. A. Ry. Co.* v. *Wallace,* 223 U. S. 481; *Pennsylvania R. R. Co.* v. *International Coal Co.,* 230 U. S. 184; *Florida East Coast Ry. Co.* v. *United States,* 234 U. S. 167; *Pennsylvania R. R. Co.* v. *Puritan Coal Co.,* 237 U. S. 121; *Eastern Ry. Co.* v. *Littlefield,* 237 U. S. 140; *Illinois Central R. R. Co.* v. *Mulberry Hill Coal Co.,* 238 U. S. 275; *Philadelphia & Reading Ry. Co.* v. *United States,* 240 U. S. 334; *Pennsylvania R. R. Co.* v. *Jacoby & Co.,* 242 U. S. 89; *Pennsylvania R. R. Co.* v. *Sonman Coal Co.,* 242 U. S. 120; *Swift & Co.* v. *Hocking Valley Ry. Co.,* 243 U. S. 281; *Pennsylvania R. R. Co.* v. *Kittanning Iron Co.,* 253 U. S. 319; *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Hasty & Sons,* 255 U. S. 252; *Central R. R. Co.* v. *United States,* 257 U. S. 247; *Schaff* v. *Famechon Co.,* 258 U. S. 76.

The only two decisions of state or subordinate federal courts which have followed and applied the decision in the *American Tie & Timber Case, supra,* are: *Cheney* v. *Boston & Maine R. R.,* 227 Mass. 336; and *Poor* v. *Western Union Telegraph Co.,* 196 Mo. App. 557.

The following decisions of state and subordinate federal courts with reference to the jurisdiction of the Interstate Commerce Commission and of the courts, respectively, over questions arising under the Interstate Commerce Act, were either rendered before the decision in

the *American Tie & Timber Case*, or are distinguishable from that case: *Hite* v. *Central R. R. of N. J.*, 171 Fed. 370; *National Pole Co.* v. *C. & N. W. Ry. Co.*, 211 Fed. 65; *Gimble Bros., Inc.* v. *Barrett*, 215 Fed. 1004; *Chicago, Burlington & Quincy Ry. Co.* v. *Feintuch*, 191 Fed. 482; *Kansas City Southern Ry. Co.* v. *Tonn*, 102 Ark. 20; *Hardaway* v. *Southern Ry. Co.*, 90 S. Car. 475; *Western & Atlantic R. R. Co.* v. *White Provision Co.*, 142 Ga. 246; *Southern Pacific Co.* v. *Frye & Bruhn, Inc.*, 82 Wash. 9; *St. Louis, San Francisco & Texas Ry. Co.* v. *Roff Oil Co.*, 61 Tex. Civ. App. 190; *Laing-Harris Coal Co.* v. *St. Louis & San Francisco R. R. Co.*, 15 I. C. C. 37.

Mr. Harold G. Simpson for respondent.

Mr. Justice Brandeis delivered the opinion of the court.

This action was brought by the Merchants Elevator Company in a state court of Minnesota against the Great Northern Railway Company and the Director General to recover $80 alleged to have been exacted in violation of the carrier's tariff. That sum had been demanded by the carrier, under Rule 10 of its tariff, as a reconsignment charge, at the rate of $5 a car, for sixteen cars of corn shipped from points in Iowa and Nebraska to Willmar, Minnesota, and after inspection there rebilled to Anoka, a station beyond. The tariff rate from the points of origin via Willmar to Anoka was the same as to Willmar. Willmar had been named as destination in the original bill of lading, only because it is the place at which grain coming into the State by this route is inspected and graded under the laws of Minnesota and of the United States; and the carrier knew, or should have known, that fact. Immediately after inspection disposition orders were given and the original bills of lading were surrendered in exchange for billing to Anoka. Rule 10 read:

" Diversion or reconsignment to points outside switching limits before placement: If a car is diverted, reconsigned or reforwarded on orders placed with the local freight agent or other designated officer after arrival of car at original destination, but before placement for unloading, . . . a charge of $5.00 per car will be made if car is diverted, reconsigned or reforwarded to a point outside of switching limits of original destination."

The shipper contended that the case was within the exception known as Exception (a), as amended by Supplement One, which provided that rules (including Rule 10) shall not apply to:

"(a) Grain, seed (field), seed (grass), hay or straw, carloads, held in cars on track for inspection and disposition orders incident thereto at billed destination or at point intermediate thereto."

Whether the charge was payable depended solely upon a question of construction; that is, whether the body of the rule or the exception to it applied. On this question there was room for reasonable difference of opinion. The carrier, relying particularly upon *Texas & Pacific Ry. Co.* v. *American Tie & Timber Co.*, 234 U. S. 138, and *Loomis* v. *Lehigh Valley R. R. Co.*, 240 U. S. 43, claimed seasonably that until the true construction of the tariff had been determined by the Interstate Commerce Commission, the trial court was without jurisdiction. That court overruled the objection; construed the exception to mean that cars of grain are exempted from Rule 10 if held on track at billed destination for inspection and for " disposition orders " incident to such inspection; held that the disposition order may be an order to make disposition by way of reconsignment to another destination and that forwarding to Anoka was such disposition; and entered judgment for the shipper. That judgment was affirmed by the Supreme Court of the State on the authority of *Reliance Elevator Co.* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 139 Minn.

69. The case is here on writ of certiorari, 255 U. S. 567. The tariff containing the rule under which the $5 charge was made was the only governing tariff. It had been duly filed with the Interstate Commerce Commission. The validity of the tariff, including the rule and exception, was admitted. And there was no dispute concerning the facts. The question argued before us is not whether the state courts erred in construing or applying the tariff, but whether any court had jurisdiction of the controversy, in view of the fact that the Interstate Commerce Commission had not passed upon the disputed question of construction.

The contention that courts are without jurisdiction of cases involving a disputed question of construction of an interstate tariff, unless there has been a preliminary resort to the Commission for its decision, rests, in the main, upon the following argument. The purpose of the Act to Regulate Commerce is to secure and preserve uniformity. Hence, the carrier is required to file tariffs establishing uniform rates and charges, and is prohibited from exacting or accepting any payment not set forth in the tariff. Uniformity is impossible, if the several courts, state or federal, are permitted, in case of disputed construction, to determine what the rate or charge is which the tariff prescribes. To ensure uniformity the true construction must, in case of dispute, be determined by the Commission.

This argument is unsound. It is true that uniformity is the paramount purpose of the Commerce Act. But it is not true that uniformity in construction of a tariff can be attained only through a preliminary resort to the Commission to settle the construction in dispute. Every question of the construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff it is one of federal law. If the parties properly preserve their rights, a construction given by any court, whether it be federal or state, may ultimately be reviewed by this court either on writ of error or on writ of certiorari; and

thereby uniformity in construction may be secured. Hence, the attainment of uniformity does not require that in every case where the construction of a tariff is in dispute, there shall be a preliminary resort to the Commission.

Whenever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. Sometimes this is required because the function being exercised is in its nature administrative in contradistinction to judicial. But ordinarily the determining factor is not the character of the function, but the character of the controverted question and the nature of the enquiry necessary for its solution. To determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. It is required because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts. But what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute.

When the words of a written instrument are used in their ordinary meaning, their construction presents a question solely of law. But words are used sometimes in a peculiar meaning. Then extrinsic evidence may be neces-

sary to determine the meaning of words appearing in the document. This is true where technical words or phrases not commonly understood are employed. Or extrinsic evidence may be necessary to establish a usage of trade or locality which attaches provisions not expressed in the language of the instrument. Where such a situation arises, and the peculiar meaning of words, or the existence of a usage, is proved by evidence, the function of construction is necessarily preceded by the determination of the matter of fact. Where the controversy over the writing arises in a case which is being tried before a jury, the decision of the question of fact is left to the jury, with instructions from the court as to how the document shall be construed, if the jury finds that the alleged peculiar meaning or usage is established.[1] But where the document to be construed is a tariff of an interstate carrier, and before it can be construed it is necessary to determine upon evidence the peculiar meaning of words or the existence of incidents alleged to be attached by usage to the transaction, the preliminary determination must be made by the Commission; and not until this determination has been made, can a court take jurisdiction of the controversy. If this were not so, that uniformity which it is the purpose of the Commerce Act to secure could not be attained. For the effect to be given the tariff might depend, not upon construction of the language—a question of law—but upon whether or not a particular judge or jury had found, as a fact, that the words of the document were used in the peculiar sense attributed to them or that a particular usage existed.

[1] *Goddard* v. *Foster*, 17 Wall. 123, 142; *Hutchison* v. *Bowker*, 5 M. & W. 535, 542; *Tubbs* v. *Mechanics' Insurance Co.*, 131 Ia. 217; *Aetna Indemnity Co.* v. *Waters*, 110 Md. 673; *Tower Co.* v. *Southern Pacific Co.*, 184 Mass. 472. See *Ogden* v. *Parsons*, 23 How. 167, 170; *Fuller* v. *Metropolitan Life Insurance Co.*, 70 Conn. 647, 677; Thayer. Preliminary Treatise on Evidence, 203–207, 215, 259.

It may happen that there is a dispute concerning the meaning of a tariff which does not involve, properly speaking, any question of construction. The dispute may be merely whether words in the tariff were used in their ordinary meaning, or in a peculiar meaning. This was the situation in the *American Tie & Timber Co. Case, supra.* The legal issue was whether the carrier did or did not have in effect a rate covering oak ties. The only matter really in issue was whether the word " lumber " which was in the tariff, had been used in a peculiar sense. The trial judge charged the jury: " If you believe from the evidence that oak railway cross ties are lumber within the meaning and usage of the lumber and railroad business, then you are charged the defendant had in effect a rate applying on the ties offered for shipment." This question was obviously not one of construction; and there is not to be found in the opinion of this court, or in the proceedings in either of the lower courts, a suggestion that the case involved any disputed question of construction. The only real question in the case was one of fact; and upon this question of fact " the views of men engaged in the lumber and railroad business as developed in the testimony " were in " irreconcilable conflict," p. 146. As that question, unlike one of construction, could not be settled ultimately by this court, preliminary resort to the Commission was necessary to ensure uniformity. The situation in *Loomis* v. *Lehigh Valley R. R. Co., supra,* was similar. There the question to be decided did not require the consideration of voluminous conflicting evidence; but it involved the exercise of administrative judgment. The carrier had been requested by a shipper of grain, fruits and vegetables to supply cars for loading. In order to load ordinary box cars to the minimum capacity on which the freight rates are based and to the maximum to which the shipper is entitled, it is necessary that they should be equipped with grain doors or transverse bulkheads, so that they may

safely contain the load and enable unloading to be done without waste and inconvenience. Those sent lacked the inside doors and bulkheads. The carrier having refused to furnish these, the shipper was obliged to do so and sought reimbursement. The tariff was silent on the subject. The controverted question was not how the tariff should be construed, but what character of equipment should be deemed reasonable. To determine this enquiry the court held that preliminary resort to the Commission must be had, because "an adequate consideration of the . . . controversy would require acquaintance with many intricate facts of transportation and a consequent appreciation of the practical effect of any attempt to define services covered by a carrier's published tariffs, or character of equipment which it must provide, or allowances which it may make to shippers for instrumentalities supplied and services rendered."

In the case at bar the situation is entirely different from that presented in the *American Tie & Timber Co. Case*, or in the *Loomis Case*. Here no fact, evidential or ultimate, is in controversy; and there is no occasion for the exercise of administrative discretion. The task to be performed is to determine the meaning of words of the tariff which were used in their ordinary sense and to apply that meaning to the undisputed facts. That operation was solely one of construction; and preliminary resort to the Commission was, therefore, unnecessary. The petition for certiorari was asked for on the ground that the decision of the Supreme Court of Minnesota in this case was in conflict with the above decisions of this court and also that the decisions in several state courts and in the lower federal courts were in serious conflict on the question involved. In the brief and argument on the merits, it was also asserted that some recent decisions of this court are in conflict with the rule declared and applied in the *American Tie & Timber Co. Case, supra*, and the *Loomis*

Case, supra. If in examining the cases referred to [1] there is borne in mind the distinction above discussed between

[1] In the following cases in which the jurisdiction of the court was sustained without preliminary resort to the Commission, the question involved was solely one of construction of a tariff, or otherwise a question of law, and not one of administrative discretion. (1) *Louisville & Nashville R. R. Co.* v. *Cook Brewing Co.*, 223 U. S. 70, 84; *Pennsylvania R. R. Co.* v. *International Coal Co.*, 230 U. S. 184, 196; *Pennsylvania R. R. Co.* v. *Puritan Coal Co.*, 237 U. S. 121, 134; *Eastern Ry. Co.* v. *Littlefield*, 237 U. S. 140; *Illinois Central R. R. Co.* v. *Mulberry Hill Coal Co.*, 238 U. S. 275; *Pennsylvania R. R. Co.* v. *Sonman Coal Co.*, 242 U. S. 120; *Pennsylvania R. R. Co.* v. *Kittanning Iron & Steel Mfg. Co.*, 253 U. S. 319. See also *Swift & Co.* v. *Hocking Valley Ry. Co.*, 243 U. S. 281; *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Hasty & Sons*, 255 U. S. 252, 256. (2) *Hite* v. *Central R. R. of N. J.*, 171 Fed. 370, 372; *Gimble Bros., Inc.* v. *Barrett*, 215 Fed. 1004; 218 Fed. 880; 226 Fed. 623; *National Elevator Co.* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 246 Fed. 588; *Francesconi & Co.* v. *Baltimore & Ohio R. R. Co.*, 274 Fed. 687, 691. Compare *Empire Refineries, Inc.* v. *Guaranty Trust Co.*, 271 Fed. 668. (3) *Kansas City Southern Ry. Co.* v. *Tonn*, 102 Ark. 20, 26; *Western & Atlantic R. R. Co.* v. *White Provision Co.*, 142 Ga. 246; *Gustafson* v. *Michigan Central R. R. Co.*, 296 Ill. 41; *Wolverine Brass Works* v. *Southern Pacific Co.*, 187 Mich. 393, 396; *Reliance Elevator Co.* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 139 Minn. 69; *St. Louis, San Francisco & Texas Ry. Co.* v. *Roff Oil & Cotton Co.*, 61 Tex. Civ. App. 190, 192; *Southern Pacific Co.* v. *Frye & Bruhn, Inc.*, 82 Wash. 9. Compare *Hardaway* v. *Southern Ry. Co.*, 90 S. Car. 475. See *contra Cheney* v. *Boston & Maine R. R.*, 227 Mass. 336. Compare *Poor* v. *Western Union Telegraph Co.*, 196 Mo. App. 557, 564.

In the following cases where the court refused to take jurisdiction because there had not been preliminary resort to the Commission, the question presented either was one of fact or called for the exercise of administrative discretion. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Baltimore & Ohio R. R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481; *Mitchell Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 247; *Morrisdale Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 304; *Northern Pacific Ry. Co.* v. *Solum*, 247 U. S. 477, 483; *Director General* v. *Viscose Co.*, 254 U. S. 498. See also *United States* v. *Pacific & Arctic Ry. & Nav. Co.*, 228 U. S. 87.

GREAT NORTHERN RAILWAY COMPANY ET AL. *v.* MERCHANTS ELEVATOR COMPANY.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 202. Argued April 18, 1922.—Decided May 29, 1922.

When, in an action by a shipper to recover charges exacted by a carrier under an interstate tariff, the rights of the parties depend entirely upon a legal construction of the tariff, involving no question of fact either in aid of the construction or in other respect, and no question of administrative discretion, the courts have jurisdiction without preliminary resort to the Interstate Commerce Commission. P. 289. *Texas & Pacific Ry. Co.* v. *American Tie &*

controversies which involve only questions of law and those which involve issues essentially of fact or call for the exercise of administrative discretion, it will be found that the conflict described does not exist and that the decisions referred to are in harmony also with reason.

Affirmed.